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United States
Court of Appeals
for the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

MRS. DOROTHY WARD GINOCCHIO,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Nevada

FILED

JUN 2 1949

PAUL P. O'BRIEN,

CLERK

No. 12234

United States
Court of Appeals
for the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

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NAMES AND ADDRESSES OF ATTORNEYS

SIDNEY FEINBERG, ESQ.,

T. G. FITZGERALD, ESQ.,

J. GREGORY DONOHUE, ESQ.,

Office of the Housing Expediter,
180 New Montgomery Street, Room 300,
San Francisco 5, California,

For the Appellant.

EMERSON J. WILSON, ESQ.,

123 West 1st Street,
Reno, Nevada,

For the Appellee.

In the District Court of the United States
For the District of Nevada

No. 675

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

MRS. DOROTHY WARD GINOCCHIO,

Defendant.

COMPLAINT FOR RESTITUTION
AND INJUNCTION

1. In the judgment of the Housing Expediter, the defendant engaged in actions and practices which constitute a violation of Section 206(a) of the Housing and Rent Act of 1947, (hereinafter called the Act).

2. Jurisdiction of this action is conferred upon this Court by Section 206(b) of the Act.

3. At all times mentioned herein, defendant was the landlord of and rented certain housing accommodations located at 415 East 8th Street, Reno, Nevada.

4. Since July 1, 1947, there has been in full force and effect pursuant to the Act, the Rent Regulation under the Housing and Rent Act of 1947 (12 F.R. 4331), hereinafter called the Regulation, establishing maximum rentals for the use and occupancy of housing accommodations within the defense rental area in which the premises referred to in Paragraph 3 above are located.

5. On December 12, 1947, the Rent Director for

the defense rental area having jurisdiction over the area in which the above-mentioned premises are located, issued an order reducing the maximum rental of the above-described [1*] accommodations and making such reduction effective as of August 1, 1947, and directing the defendant to refund to the tenant within thirty (30) days after issuance of the order, any rent received by the defendant in excess of the maximum legal rent fixed by the order.

6. The amount of rent demanded and received from the tenant by the defendant between August 1, 1947, and December 12, 1947, inclusive, in excess of the maximum rent fixed by the above-mentioned order was \$1,100.00, and the defendant violated the Regulation in that defendant failed and refused to refund to the tenant the said \$1,100.00 or any part thereof within thirty (30) days after the issuance of the order, as required by the order, as appears more fully on Schedule "A" attached hereto.

Wherefore, the Housing Expediter demands:

1. A permanent injunction enjoining the defendant, her attorneys, agents and employees, and all persons in active concert or participation with the defendant from directly or indirectly demanding or receiving rents in excess of the maximum rents established by any regulation or order heretofore or hereafter adopted, pursuant to the Housing and Rent Act of 1947, as heretofore or hereafter amended, or extended, or superseded.

2. That an order issue ordering the defendant to tender to the following named person the following

* Page numbering appearing at foot of page of original certified Transcript of Record.

sum, said sum being the amount by which the rent demanded and received by the defendant from said person as rent for the use and occupancy of housing accommodations exceeded the maximum rentals established by the Regulation:

Mathew S. Weiser, \$1,100.00.

Dated January 20, 1948.

/s/ SIDNEY FEINBERG,
Chief, Rent Litigation Unit,

/s/ T. G. FITZGERALD,
Attorney, Rent Litigation Unit,
Attorneys for Plaintiff. [2]

EXHIBIT "A"

Schedule

Tenant: Mathew S. Weiser.

Unit: House at 415 East 8th St., Reno, Nevada.

Date Rented: 8-1-47 to 12-31-47.

Rent Collected: \$250.00 per month.

Maximum Legal Rent: \$180.00 per month.

Number of Overcharges: 5.

Amount of Each Overcharge: \$70.00 per month.

Overcharge to Each Tenant: \$350.00.

Defendant demanded and received and retains the sum of \$750.00 from her tenant as a bonus, security deposit or prepayment of rent in violation of the regulations.

Total amount refundable to tenant: \$1,100.00.

[Endorsed]: Filed Jan. 24, 1948.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Sidney Feinberg and T. G. Fitzgerald plaintiff's attorneys, whose address is: Office of Rent Control, O.H.E., Rent Litigation Unit, 1355 Market Street, Room 903, San Francisco 3, California, an answer to the complaint which is herewith served upon you, within 20 days after the service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

(Seal) /s/ AMOS C. DICKEY,
 Clerk of Court.

By /s/ DAN MURPHY,
 Deputy Clerk.

Date: January 24, 1948. [4]

RETURN ON SERVICE OF WRIT

United States of America,
District of Nevada—ss.

I hereby certify and return that I served the annexed summons on the therein-named Mrs. Dorothy Ward Ginocchio served on Mr. Joe Ginocchio (husband) account Dorothy Ward Ginnocchio avoided service by handing to and leaving a true and correct copy together with copy of Complaint for Restitution

and Injunction with Mr. Joe Ginocchio, personally, at Reno, Nevada, in said District on the 31st day of January, 1948.

EDWARD M. RANSON,
U.S. Marshal.

By /s/ ROSCOE P. DUNCAN,
Deputy.

[Endorsed]: Filed Feb. 3, 1948.

[Title of District Court and Cause.]

MOTION

Comes now the defendant, by and through her attorney, Chas. L. Richards, and moves to dismiss the within cause on the following grounds, to-wit:

That the Complaint fails to state a claim upon which relief shall be granted, together with the following additional grounds:

(a) That it does not appear on the face of the Complaint who the tenant, or tenants, receiving the housing accommodations was, or were.

(b) That it does not appear on the face of the Complaint who is entitled to receive the overcharge, if any, alleged in the Complaint and Schedule attached thereto.

(c) That the plaintiff (Housing Expediter) shows no interest in the litigation other than a request for a possible right to an injunction.

(d) That there is no showing on the face of the Complaint that the premises in question are located in any area properly designated as a defense rental area. [5]

(e) That it does not appear on the face of the Complaint that the premises in question fall within the Act Definition "Controlled Housing Accommodations" as defined in Act and Regulation sued upon.

(f) That the Schedule (Exhibit "A") annexed to the Complaint fails to justify the amount claimed.

(g) That to pay Matthew S. Weiser \$1,100.00, as per the prayer in the Complaint, would not settle all rights involved, because he is not the only tenant according to the terms of the lease given covering the premises involved.

(h) That the "Housing Accommodations" involved herein are not known as 415 East 8th Street, Reno, Nevada, but known as 415½ East 8th Street, Reno, Nevada.

/s/ CHAS. L. RICHARDS,
Attorney for Defendant.

[Endorsed]: Filed Feb. 19, 1948. [6]

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION
TO DISMISS

A motion to dismiss complaint in the above-entitled action having been filed and the same having come on for hearing on April 20, 1948, in the above-entitled Court, Honorable Roger T. Foley, Judge Presiding, Fausta Kukuritis, attorney appearing for plaintiff, and Charles L. Richards, attorney appearing for defendant, and the same having been argued by aforementioned counsel and the Court being advised in the premises,

It Is Hereby Ordered that the Motion to Dismiss heretofore entered by defendant is hereby denied and the defendant is given twenty (20) days from the 20th day of April, 1948, within which to serve and file the Answer to the complaint on file herein.

Dated this 23rd day of April, 1948.

/s/ ROGER T. FOLEY,

Judge of the United States District Court.

Approved as to form:

/s/ CHARLES L. RICHARDS,

Attorney for Defendant.

[Endorsed]: Filed April 23, 1948. [7]

[Title of District Court and Cause.]

ANSWER

Comes now the above-named defendant and in answer to plaintiff's Complaint for Restitution and Injunction, admits, denies and alleges as follows:

1.

Denies that defendant engaged in action and practices which constitute a violation of Section 206(a) of the Housing and Rent Act of 1947, notwithstanding the judgment of the Housing Expediter to the contrary.

2.

Admits the allegations contained in paragraph 2 thereof.

3.

Admits the allegations contained in paragraph 3 thereof, but alleges in connection therewith an addi-

tional housing unit of number 415 $\frac{1}{2}$ East 8th Street, Reno, Nevada.

4.

Admits the allegations contained in paragraph 4 thereof.

5.

Admits the allegations contained in paragraph 5 thereof. [8]

6.

Admits the allegations contained in paragraph 6 thereof, but defendant further alleges that her failure and refusal to refund to the defendant the said \$1,100.00 within thirty days after the issuance of said order, as required by the order, as appears more fully in Schedule "A" attached to plaintiff's Complaint herein, were due to the fact that she honestly believed that the Rent Expediter of the Reno rent area had exceeded his powers under the Act of 1947, due to the decontrolled feature of the rental accommodation in question which took it without his jurisdiction.

Wherefore, the defendant demands:

1. That the action be dismissed, refusing the permanent injunction requested therein against defendant, enjoining defendant, her attorneys, agents and employees from directly or indirectly demanding or receiving rents in excess of the maximum rents established by any regulation or order heretofore or hereafter adopted pursuant to the Housing and Rent Act of 1947, as amended, extended or superseded.

2. That the request that an order issue ordering the defendant to tender to Matthew S. Weiser the sum of \$1,100.00 as rent received by defendant from

said Weiser for the use and occupancy of housing accommodations exceeding the maximum rentals established by the regulations, be denied.

3. That an order issue to the effect that the housing accommodations in question and under consideration be adjudged as decontrolled in character, under the Housing and Rent Act of 1947.

4. That the lease entered into by and between Matthew S. Weiser and Helen A. Weiser, his wife, dated July 30, 1947, with the defendant herein, be declared valid and in full force and effect, and that the said Matthew S. Weiser and [9] Helen A. Weiser be ordered to comply with the terms and conditions provided therein.

5. That the defendant have any costs in connection with said proceeding that might be just and proper.

/s/ CHAS. L. RICHARDS,
Attorney for Defendant.

[Endorsed]: Filed May 10, 1948. [10]

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR ADMISSIONS

Pursuant to the provisions of Rule 36, as amended, of the Federal Rules of Civil Procedure, plaintiff requests defendant, Mrs. Dorothy Ward Ginocchio, within ten days from the service hereof, to admit the genuineness of the documents described and exhibited herewith, and to admit the truth of the following relevant matters of fact, for the purpose of this ac-

tion only, and subject to all pertinent objections to admissibility which may be interposed at trial:

1. That by Order issued September 9, 1947, a true and correct copy of which Order is hereto attached and marked Exhibit "A", the Area Rent Director made his determination that the housing accommodations described in said Order were not decontrolled under the Housing and Rent Act of 1947.

2. That during the period August 1, 1947, to December 31, 1947, as fixed by Order of the Area Rent Director, dated [11] December 12, 1947, effective August 1, 1947, a true and correct copy of which Order is hereto attached and marked Exhibit "B", the prescribed maximum rent for the housing accommodations located within the Reno Defense-Rental Area, and formerly described as 415 and 415½ East Eighth Street, Reno, Nevada, now being described as 415 East Eighth Street, Reno, Nevada, was the sum of One Hundred Eighty Dollars (\$180.00), per month.

3. That during the period August 1, 1947, to December 31, 1947, the defendant herein, Mrs. Dorothy Ward Ginocchio, demanded or received of the tenant, Matthew S. Weiser, the sum of Eleven Hundred Dollars (\$1,100.00) as the consideration demanded or received by said defendant in connection with the use or occupancy by said tenant of the housing accommodations known or described as 415 East Eighth Street, Reno, Nevada.

Dated May 17, 1948.

/s/ SIDNEY FEINBERG,
/s/ J. GREGORY DONOHUE,
Attorneys for Plaintiff. [12]

EXHIBIT "A"

United States of America
Office of the Housing Expediter
Office of Rent Control

Stamp of Issuing Office: Office of Rent Control
O.H.E., 131 West Second Street, Reno, Nevada.

ORDER REJECTING DECONTROL REPORT

Concerning (Address of Accommodations): 415 $\frac{1}{2}$
East 8th St., Reno, Nevada. Apartment No.: House.
Docket No. 8-RE-DC-33.

To: (Name and Address of Landlord): Joe H.
Ginocchio, 1668 Oak Glen, Reno, Nevada.

To: (Name and Address of Tenant): M. S. Weiser,
415 $\frac{1}{2}$ E. 8th St., Reno, Nevada.

After due consideration of Form D-94 (Report of
Decontrol) and all available evidence, the Rent Direc-
tor has determined that the above described unit or
units do not qualify for decontrol under Section
202(c) of the Housing and Rent Act of 1947, for the
reason checked [] below:

[X] The unit is not a newly constructed dwelling
unit, the construction of which was completed
on or after February 1, 1947.

[X] The unit is not a conversion completed on or
after February 1, 1947.

[] The unit was not in existence on February 1,
1945.

[X] The unit was rented to other than a member

of the immediate family of the occupant between February 1, 1945, and January 31, 1947.

The maximum rent for the above housing accommodations remains unless changed by order, \$. (Mo. []; Wk. []) and any rent collected in excess of this amount must be refunded to the tenant.

Date September 9, 1947.

/s/ C. W.,

Rent Director. [13]

EXHIBIT "B"

(Corrected Copy.)

United States of America
Office of Housing Expediter

Stamp of Issuing Office: Office of Rent Control
O.H.E., 131 West Second Street, Reno, Nevada.

Concerning (Address of accommodations): 415
East 8th St., Reno, Nevada.

To: (Name and address of landlord): Mrs. Dorothy Ginocchio, 1668 Oak Glen Dr., Reno, Nevada.

Docket No. S-RE-1974.

The Rent Director, after consideration of all the evidence in this matter, has determined that the maximum rent for the above-described accommodations should be adjusted on the grounds stated in Sections 5(a)(1), 5(a)(3) of the Rent Regulations.

Therefore, it is ordered that the maximum rent for the above-described housing accommodations be, and it hereby is, changed from \$55.00 per month to \$180.00 per month.

This order issued December 12, 1947, and is effective on the date checked below:

From August 1, 1947.

This order will remain in effect until changed by the Office of the Housing Expediter.

/s/ C. W.,

Rent Director.

To: (Name and Address of Tenant):

Mrs. M. S. Weiser, 415 East 8th St., Reno, Nevada.

M. S. Weiser, LaSalle Hotel, Reno, Nevada.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 19, 1948. [14]

[Title of District Court and Cause.]

DEFENDANT'S ADMISSIONS

Comes now the above-named defendant and complying with Plaintiff's Request for Admissions filed herein, does admit the truth of the following relevant matter of fact:

1. Admits the truth of the statement contained in paragraph 1.

2. Admits the truth of the statement contained in paragraph 2.

3. Denies the truth of the statement contained in paragraph 3, but admits the following facts relative to rent received by defendant herein, during the period August 1, 1947, to December 31, 1947:

Defendant received Two Hundred Fifty Dollars (\$250.00) for the month of August, 1947;

Defendant received Two Hundred Fifty Dollars (\$250.00) for the month of September, 1947;

Defendant received Two Hundred Fifty Dollars (\$250.00) for the month of October, 1947;

making the total amount received by said defendant during said period Seven Hundred Fifty Dollars (\$750.00).

4. That the order adjusting maximum rent, made on December 12, 1947, fixing same at One Hundred Eighty Dollars (\$180.00) per month, was Seventy Dollars (\$70.00) per month [16] less than the rental fixed by lease on said premises; that defendant had accepted three (3) months' rent carrying said excessive amount \$70.00 per month), or a total of Two Hundred Ten Dollars (\$210.00) during said period.

5. That defendant herein further states that she has not received any further payment of rental on said premises from January 1, 1948, to date.

Respectfully submitted,

/s/ CHAS. L. RICHARDS,
Attorney for Defendant.

Dated: Reno, Nevada, May 21, 1948.

[Endorsed]: Filed May 22, 1948. [17]

[Title of District Court and Cause.]

ORDER OF PRE-TRIAL CONFERENCE

It Is Hereby Ordered:

That Miss Fausta Kukuritis, 1355 Market St., San Francisco 3, Calif., Attorney for plaintiff in the above-entitled action, and that Charles L. Richards, Esq., Waldorf Bldg., Reno, Nevada, Attorney for defendant in the above-entitled action, appear before the Court at 3:00 o'clock p.m. on the 15th day of June, A.D. 1948, at the courtroom of the above-entitled Court in the Post Office Building at Carson City, Nev., for a conference to consider with reference to the above-entitled action:

1. The simplification of the issues;
2. The necessity or desirability of amendments to the pleadings;
3. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
4. The limitation of the number of expert witnesses;
5. The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by a jury;
6. Such other matters as may aid in the disposition of the action.

Such pre-trial conference is hereby called pur-

suant to Rule 16 Federal Rules of Civil Procedure.

Dated: This 7th day of June, A.D. 1948.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed June 7, 1948. [18]

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL CONFERENCE

Pursuant to the Order heretofore made, the Pre-Trial Conference in the above-entitled action was held at Carson City, Nevada, at 3:00 p.m. on June 15th, 1948, Miss Fausta Kukuritis of the Office of the Housing Expediter appearing for plaintiff, and Charles L. Richards, Esq., appearing for defendant,

It Is Hereby Ordered that the action taken at such Pre-Trial Conference is as follows:

Paragraphs I, II, III, IV and V of the Complaint are admitted.

As to Paragraphs VI of the Complaint:

Defendant admits that she received \$250.00 for the month of August, 1947, as rent for the said premises; defendant admits that she received \$250.00 for the month of September, 1947, as rent for the said premises; defendant admits that she received \$250.00 for the month of October, 1947, as rent for the said premises; making the total amount received by the said defendant during said period, 8/1/47 to 12/31/47, the sum of \$750.00.

Defendant admits the allegations contained in Paragraph VI thereof, but defendant further al-

leges that her failure and refusal to refund to the defendant the said \$1,100.00 within thirty days after the issuance of said order, [19] as required by the order, as appears more fully in Schedule "A" attached to plaintiff's Complaint herein, were due to the fact that she honestly believed that the Rent Expediter of the Reno rent area had exceeded his powers under the Act of 1947, due to the decontrolled feature of the rental accommodation in question, to-wit, guest house, which took it without his jurisdiction.

Plaintiff contends that the tenant named in the Schedule attached to the plaintiff's Complaint, Matthew S. Weiser, paid to the defendant as rental for said premises the sum of \$2,000.00 for the term beginning August 1, 1947, and ending December 31, 1947, and in support of such contention the plaintiff offers in evidence four cancelled vouchers marked as plaintiff's Exhibit 1, said cancelled vouchers total the sum of \$2,000.00.

Plaintiff further contends that the legal maximum rent for the premises at 415 East 8th Street, Reno, Nevada, is \$180.00 per month effective from August 1, 1947, pursuant to order of Area Rent Director issued December 12, 1947.

This case is set for trial before the Court without a jury at Carson City, Nevada, on Tuesday, December 14, 1948, at 10:00 a.m.

Dated: This 6th day of July, 1948.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed July 6, 1948. [20]

[Title of District Court and Cause.]

WITHDRAWAL OF ATTORNEY

I hereby withdraw as counsel for the defendant, Mrs. Dorothy Ward Ginocchio, in the above-entitled action, the same to take effect immediately.

Respectfully submitted,

/s/ CHAS. L. RICHARDS.

Carbon Copies Sent to the Defendant—Reno, Nevada. Miss Kukuritis—Atty. for Plaintiff. Mr. Emerson J. Wilson, Reno, Nevada.

[Endorsed]: Filed Nov. 12, 1948. [21]

[Title of District Court and Cause.]

COPY OF CIVIL DOCKET ENTRY OF
JANUARY 20, 1949

Jan. 20, 1949: Entering Judgment. Judgment. The Court finds, and it is ordered that on and after February 1, 1947, additional housing accommodations were created by conversion; and that the premises in question are not subject to control under the statute. It Is Ordered that the prayer of plaintiff's complaint asking for a permanent injunction and for a refund of \$1100.00 to the tenant is denied.

Jan. 20, 1949: Counsel advised as to entry of Judgment.

.....

A true copy from the records. Attest:

(Seal)

AMOS P. DICKEY,

Clerk,

By /s/ J. P. FODRIN,

Deputy. [22]

In the District Court of the United States
for the District of Nevada

No. 675

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

MRS. DOROTHY WARD GINOCCHIO,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECREE

This Cause having heretofore on the 19th day of January, 1949, come on regularly to be heard before the above-entitled Court, sitting without a jury; the plaintiff appearing by his counsel, J. Gregory Donohue, Esq.; the defendant appearing in person, and by her counsel, Emerson J. Wilson, Esq., and certain evidence being adduced by plaintiff and defendant, the case was submitted to the Court for decision.

Wherefore, upon said last-named day, all the law and the evidence being considered, the Court rendered its decision in favor of the defendant and against the plaintiff, and ordered that Findings of Fact, Conclusions of Law and Decree be drawn in accordance therewith.

Wherefore, by reason of the premises, the Court here makes its certain Findings of Fact and draws its Conclusions of Law as follows:

FINDINGS OF FACT

The Court finds as matter of fact,

1. That at all times mentioned in plaintiff's complaint [23] defendant was the owner of certain housing accommodations located at 415 East 8th Street, Reno, Nevada.

2. That on or about July 30, 1947, defendant leased the housing accommodations at 415 East 8th Street, Reno, Nevada, to Matthew S. Weiser and Helen A. Weiser:

3. That defendant duly filed with Office of Rent Control, Reno, Nevada, application for decontrol of said housing accommodations at 415 East 8th Street, Reno, Nevada.

4. That said application for decontrol of said premises was denied September 9, 1947, by the Reno, Nevada, Area Rent Office;

5. That defendant filed petition with Reno Rent Advisory Board seeking recommendation of that Board relative to decontrol of said premises, pursuant to suggestions of the Reno Area Rent Office;

6. That the Reno Rent Advisory Board on November 25, 1947, approved the action of the Reno Area Rent Office refusing the application of defendant for decontrol of said premises;

7. That on December 20, 1947, defendant forwarded a copy of the petition filed with Reno Rent Advisory Board to the Regional Rent Administrator pursuant to request by Regional Rent Administrator for review by the Regional Rent Administrator;

8. That this action was filed January 24, 1948;

9. That the Regional Rent Administrator on February 10, 1948, made his finding that the proceedings with respect to decontrol of said premises were handled by the Area Rent Office in accordance with the Rent Regulations and an interpretation of the Rent Regulations by the Regional Rent attorney;

10. That the construction of the housing accommodations leased by defendant to Matthew S. Weiser and Helen A. Weiser, in July, 1947, was completed after February 1, 1947;

11. That the housing accommodations leased by defendant to Matthew S. Weiser and Helen A. Weiser in July, 1947, are additional [24] accommodations created subsequent to February 1, 1947.

CONCLUSIONS OF LAW

The Court concludes as matter of fact,

1. That defendant did not fail to pursue the administrative remedies available to her prior to the commencement of this action.

2. That the housing accommodations at 415 East 8th Street, Reno, Nevada, leased by defendant to Matthew S. Weiser and Helen A. Weiser were not controlled housing accommodations.

DECREE

Now, Therefore, by reason of the premises and in conformity with the Findings of Fact and Conclusions of Law,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That the housing accommodations belonging to

defendant at No. 415 East 8th Street, Reno, Nevada, were not at any time subsequent to August 1, 1947, and are not now, controlled housing accommodations under the provisions of the Housing and Rent Act of 1947 (Public Law 129-80th Congress, Chapter 163 1st Session);

2. That the application for a permanent injunction enjoining the defendant, her attorneys, agents and employers, and all persons in active concert or participation with the defendant from directly or indirectly demanding or receiving rents in excess of the maximum rent established by order of the Rent Director of the Reno Rental area be and the same is hereby denied;

3. That the application for an order requiring defendant to tender to Matthew S. Weiser, the sum of \$1100.00 be, and the same is, hereby denied.

Done in Open Court this 10th day of February, 1949.

/s/ ROGER T. FOLEY,
District Judge.

[Endorsed]: Filed Feb. 10, 1949. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, the Plaintiff in the above-entitled action, pursuant to the provisions of Rule 73, as amended, of the Federal Rules of Civil Procedure, files this, the within Notice of Appeal to the

United States Court of Appeals for the Ninth Circuit, appealing from the Judgment or Decree of the Court heretofore entered, on or about the 10th day of February, 1949, in the above-entitled cause.

Dated this 30th day of March, 1949.

/s/ SIDNEY FEINBERG,

/s/ J. GREGORY DONOHUE,

Attorneys for Appellant, Tighe E. Woods, Housing Expediter, Office of the Housing Expediter.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 1, 1949. [26]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, the Appellant in the above-entitled action, files this, his Designation of Contents of Record on Appeal, and designates as such record the entire and complete record and all the proceedings and evidence in said cause, including any and all exhibits of either of the parties offered, introduced or admitted into evidence in said cause.

Dated this 30th day of March, 1949.

/s/ SIDNEY FEINBERG,

/s/ J. GREGORY DONOHUE,

Attorneys for Appellant, Tighe E. Woods, Housing Expediter, Office of the Housing Expediter.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 1, 1949. [28]

[Title of District Court and Cause.]

STATEMENT OF POINTS

Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, the Appellant in the above-entitled cause, states the following points on which he intends to rely on appeal:

1. The Court below erred in denying the Plaintiff's application for injunction as prayed for in the Complaint.

2. The Court below erred in denying restitution of alleged rental overcharges to the tenant, Matthew S. Weiser.

3. The Court below erred in ordering, adjudging and decreeing that the housing accommodations belonging to defendant at 415 East 8th Street, Reno, Nevada, were not at any time subsequent to August 1, 1947, and are not now controlled housing accommodations under the provisions of the Housing and Rent Act of 1947 (Public Law 129, 80th Congress, Chapter 163, 1st Session).

4. The Court below erred in finding as a fact that the housing accommodations leased by defendant to Matthew S. Weiser and Helen A. Weiser in July, 1947, are additional accommodations created subsequent to February 1, 1947. [30]

5. The Court below erred in concluding as a matter of law that defendant did not fail to pursue the administrative remedies available to her prior to the commencement of this action.

6. The Court below erred in concluding as a matter of law that the housing accommodations at 415

East 8th Street, Reno, Nevada, leased by defendant to Matthew S. Weiser and Helen A. Weiser were not controlled housing accommodations.

7. The Court below erred in failing to hold that the afore-mentioned premises were controlled housing accommodations subject to the Housing and Rent Act of 1947, as amended.

8. The Court below erred in failing to grant judgment in favor of plaintiff and against defendant.

Dated this 30th day of March, 1949.

/s/ SIDNEY FEINBERG,

/s/ J. GREGORY DONOHUE,

Attorney for Appellant, Tighe E. Woods, Housing Expediter, Office of the Housing Expediter.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 1, 1949. [31]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR APPEAL

Upon Application of the Plaintiff herein and upon a showing of excusable neglect based on the failure of the Plaintiff to learn of the entry of judgment in the above-entitled action, due to the following facts:

The judgment was entered by the Clerk immediately upon oral rendition from the bench. Counsel for the prevailing party, the defendant, was requested to prepare and submit findings of fact and

conclusions of law. That said findings of fact and conclusions of law were signed by the Judge on the 10th day of February, 1949, and on that day filed with the Clerk of the Court. Counsel for the plaintiff has computed the time allowed for the taking of an appeal to be sixty (60) days from the signing and filing of said findings of fact and conclusions of law.

It Is Hereby Ordered that the time for appeal herein be, and the same hereby is, extended for a period not exceeding thirty (30) days from the expiration of the original time for appeal prescribed in Rule 73(a) as amended, of the Federal Rules of Civil Procedure.

Dated: This 8th day of April, A.D. 1949.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed April 8, 1949. [33]

[Title of District Court and Cause.]

AMENDED NOTICE OF APPEAL

Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, the Plaintiff in the above-entitled action, pursuant to the provisions of Rule 73, as amended, of the Federal Rules of Civil Procedure, files this, the within Amended Notice of Appeal to the United States Court of Appeals for the

Ninth Circuit, appealing from the final Judgment or Decree of the Court heretofore entered herein.

Dated this 5th day of April, 1949.

/s/ SIDNEY FEINBERG,

/s/ J. GREGORY DONOHUE,

Attorneys for Appellant, Tighe E. Woods, Housing Expediter, Office of the Housing Expediter.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 8, 1949. [34]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, the Appellant in the above-entitled action, files this, his Amended Designation of Contents of Record on Appeal, and designates as such record the entire and complete record and all the proceedings and evidence in said cause, including any and all exhibits of either of the parties offered, introduced or admitted into evidence in said cause.

Dated this 5th day of April, 1949.

/s/ SIDNEY FEINBERG,

/s/ J. GREGORY DONOHUE,

Attorneys for Appellant, Tighe E. Woods, Housing Expediter, Office of the Housing Expediter.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 8, 1949. [36]

[Title of District Court and Cause.]

AMENDED STATEMENT OF POINTS

Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, the Appellant in the above-entitled cause, states the following points in which he intends to rely on appeal:

1. The Court below erred in denying the Plaintiff's Application for injunction as prayed for in the Complaint.

2. The Court below erred in denying restitution of alleged rental overcharges to the tenant, Matthew S. Weiser.

3. The Court below erred in ordering, adjudging and decreeing that the housing accommodations belonging to defendant at 415 East 8th Street, Reno, Nevada, were not at any time subsequent to August 1, 1947, and are not now controlled housing accommodations under the provisions of the Housing and Rent Act of 1947 (Public Law 129, 80th Congress, Chapter 163, 1st Session).

4. The Court below erred in finding as a fact that the housing accommodations leased by defendant to Matthew S. Weiser and Helen A. Weiser in July, 1947, are additional accommodations created subsequent to February 1, 1947. [38]

5. The Court below erred in concluding as a matter of law that defendant did not fail to pursue the administrative remedies available to her prior to the commencement of this action.

6. The Court below erred in concluding as a matter of law that the housing accommodations at 415 East 8th Street, Reno, Nevada, leased by defendant to Matthew S. Weiser and Helen A. Weiser were not controlled housing accommodations.

7. The Court below erred in failing to hold that the afore-mentioned premises were controlled housing accommodations subject to the Housing and Rent Act of 1947, as amended.

8. The Court below erred in failing to grant judgment in favor of Plaintiff and against defendant.

Dated this 5th day of April, 1949.

/s/ SIDNEY FEINBERG,

/s/ J. GREGORY DONOHUE,

Attorneys for Appellant, Tighe E. Woods, Housing Expediter, Office of the Housing Expediter.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 8, 1949. [39]

In the District Court of the United States, in and
for the District of Nevada

No. 675

Before: Hon. Roger T. Foley, Judge.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

MRS. DOROTHY WARD GINOCCHIO,

Defendant.

TRIAL

Be It Remembered, That the above matter came
on regularly for trial before the Court without a
jury on Wednesday, the 19th of January, 1949, at
Carson City, Nevada.

Appearances: J. Gregory Donohue, Rent Litiga-
tion Attorney, Attorney for Plaintiff; Emerson J.
Wilson, Attorney for Defendant.

The following proceedings were had:

The Court: Case No. 675, Woods vs. Ginocchio,
are counsel ready to proceed?

Mr. Donohue: Plaintiff is ready.

Mr. Wilson: Defendant is ready. Let the record
show that Emerson J. Wilson represents the defend-
ant in this matter.

The Court: Mr. Richards represented the de-
fendant heretofore. [70] Is there a withdrawal on
file?

Mr. Wilson: Yes, there is a withdrawal on file,
your Honor.

The Court: We had a pre-trial conference in this case and defendant has admitted the receipt of rent during the period of August 1, 1947, to December 3, 1947, in the sum of \$750.00 and then alleges defense or reason why she refused to make a refund in the sum of 1100, under the belief that the rent expediter had exceeded his powers under the act of 1947, due to the decontrol feature of the rental accommodations in question, to-wit, guest house, which took it without his jurisdiction. Plaintiff contends that the tenant named in the schedule attached to the plaintiff's complaint, Matthew S. Weiser, paid to the defendant as rental for said premises the sum of \$2,000.00 for the term beginning August 1, 1947, and ending December 31, 1947, and in support of such contention the plaintiff offers in evidence four cancelled vouchers marked as plaintiff's Exhibit 1, said cancelled vouchers total the sum of \$2,000.00. So there is a question of law to be taken care of, isn't there, the question of whether or not the rent expediter exceeded his powers as contended by the defendant. I don't quite understand the two paragraphs of this order, referring to Paragraph VI of the complaint—the first paragraph where it is acknowledged that the total amount of rent received [71] during the same period was \$750.00 and the second paragraph on page 2 of the order, where plaintiff Weiser paid to the defendant as rental for said premises the sum of \$2,000.00.

Mr. Donohue: I believe the defendant's contention is based upon the fact that while, as is

evidenced by the vouchers, the sum of two thousand dollars was paid, I believe it is the defendant's contention that the rental was not paid for those particular months but that it was paid in advance for, I believe, a two-year lease executed here, paid for the last five months, or some months towards the latter part of the lease. In that connection, of course, it is our contention that the regulations prohibited the demand or receipt of any rent in excess of the maximum except the next period of rental in advance, that it was security deposit collected in violation of the regulation and therefore should be refunded. That will probably explain that discrepancy there.

Mr. Wilson: If the Court please, in order perhaps to more clearly define the issues, the payment of the \$2,000.00 is certainly admitted.

The Court: That is admitted on the part of the plaintiff?

Mr. Wilson: On the part of the defendant, too, payment of the money. There is no question about that, the money was paid. The money was paid by virtue of a lease and the monthly [72] rental in the lease was \$250 per month, to be paid in advance, and that was paid at the execution of the lease, the last five months of the term. As to that there will be no controversy. Now the contention of the defendant is that the housing expediter exceeded his authority and jurisdiction and went beyond the scope of his power in determining a rent ceiling for this particular property. Now our contention is that as a matter of fact this housing ac-

commodation covered by this lease is not a controlled housing accommodation, for two reasons. First, there is the question of fact to be determined as to whether or not this housing accommodation is a new housing accommodation that was not rented prior to the critical date of February 1, 1947, and, of course, in this connection I assume that the government will contend that this was an old housing accommodation with substantial capital improvements. That is a question of fact to be determined there. Secondly, we contend that this housing accommodation is not a controlled accommodation, by reason of the fact that it is an entire structure, wherein 25 or less rooms are rented by a lessee—Weiser being the lessee under the lease—of the entire structure or premises. Well, that raises the further question under the proviso of the regulation—and it is our contention that all of the housing accommodations, each and every of the housing accommodations within this structure that is the subject of the lease, were exempt from rental control, [73] either under the provisions of the regulation—that would be Section 1-B of the rent regulation—or under the provision of the act. Now the provision of the rent regulation 1B provides that:

“Rooms, the structure of which were completed on or after February 1, 1947, or which are additional accommodations created by conversion on or after February 1, 1947, and rooms which at any time during the period of February 1, 1945, to January 31, 1947, were rented either as individual rooms or as part of a larger housing accommoda-

tion other than to members of the immediate family of the occupant * * *.”

Those are the two reasons which we claim exempt this housing accommodation that was the subject of the lease from control by the expediter. Now, of course, that raises a question of fact and secondly a question of the application of the law to the question of fact.

The Court: The question of fact, as I gather from your remarks, is whether or not this housing accommodation was constructed after February 1, 1947, or was—what was that?

Mr. Wilson: Whether each of the rooms within the accommodation or within the structure were either rooms created after February 1, 1947, or had been occupied only by the owner and the owner's family. [74]

Mr. Donohue: If I may interject a thought here. Prior to the question of facts being resolved, I think there is, as your Honor suggested a moment ago, a question of law to be resolved. I think the plaintiff's evidence will show that the application for decontrol on these premises was made to the Area Rent Director, which application was rejected by the Area Rent Director. The act under which the accommodations in question are governed provides for the issuance of certain rules and regulations consistent with the purpose of the act to be issued by the housing expediter, including the issuance of particular orders. The regulations which are authorized to be issued under that section provide for administration and reviews of determina-

tion by the rent director, by the regional administrator and by the national administrator. The rent director in the instant case, upon application for decontrol made by the land lord for the housing accommodations involved in this case, issued an order denying the application for decontrol. The act also sets up a rent advisory board. After the issuance of the order made by the rent director, denying the application for decontrol, the defendant applied to the rent advisory board. There also, while that board only acts in an advisory capacity to the rent director, the application for decontrol was likewise denied. The rent regulation, procedure regulation, provides upon rejection of application for order of decontrol that the owner then has the right to appeal to the [75] regional administrator. It further provides for direct protest to the national administrator. In the instant case none of those remedies have been sought. It is our position, as a matter of law, in order to be permitted to raise those questions in this court, while this court ultimately would have the jurisdiction to consider those matters, I think the rule is well settled that a person has first to exhaust his administrative remedies.

The Court: Let us stop right there a moment. Now we start with an application on behalf of the defendant for an order of decontrol and that was denied.

Mr. Donohue: By the rent director.

The Court: And then something in the nature of appeal was taken to the regional director.

Mr. Donohue: No, that was not done. They applied to the rent advisory board, which is a local board in the area, at which time they had a hearing on the matter and the board concluded that they were not entitled to decontrol. In support of that contention, your Honor, I would like to call your Honor's attention to the case of *Gates vs. Wood*, which is reported in 169 Fed. (2), page 440. It is the 4th Circuit Court of Appeals. The action there was a defensive action by the housing expediter, in which the landlord had sought injunction to restrain the enforcement of an order issued by the rent director. The court stated: [76]

"To sanction such procedure on their part would cut the heart out of administrative action and lead to chaos in the courts."

It further stated:

"The housing Expediter is expressly empowered to issue regulations and orders to adjust maximum rents and to determine which housing accommodations in a defense-rental area are 'controlled' and which are excluded by Sec. 202(c) of the Act from the term 'controlled housing accommodations.'"

"The rule is well settled that a person must first exhaust the prescribed administrative remedy before he can seek any relief in the courts."

The Court: What section of the act is 202(c)?

Mr. Donohue: That would be 50 USC Appendix, Section 1881-1902. It is in 50 USCA Appendix to the Housing Act of 1947.

The Court: Mr. Wilson, are you familiar with this case?

Mr. Wilson: To a certain extent, your Honor.

The Court: It looks as though it settles the question.

Mr. Wilson: This particular case you have reference to, yes, I am familiar with that case. At least, I am familiar with the rule that administrative remedy must be exhausted [77] before the trial court has jurisdiction.

The Court: It seems as though the situation is somewhat to the point here. Syllabus No. 1 reads:

“Where owners of housing accommodations, remodeled into two apartments, failed to pursue their administrative remedies to review orders of Area Rent Director fixing maximum rent for each of the apartments as provided in rent procedure regulation, owners were barred from seeking injunctive relief against enforcement of maximum rent orders.”

Syllabus No. 2:

“A person must first exhaust prescribed administrative remedy before he can seek any relief from the courts.”

Doesn't that settle this question?

Mr. Wilson: I am not satisfied it does, your Honor.

The Court: Let us see where we start. We start with an order—I want to see if I understand the facts here correctly—we start with an order of the Area Rent Director refusing to recognize the prem-

ises in question as not within the purview of the regulation. That was the order, wasn't it?

Mr. Wilson: That is right.

The Court: And the administrative procedures, were [78] they exhausted, that is the next question.

Mr. Wilson: That is the question, were the administrative procedures exhausted. Now I have endeavored to ascertain whether they were or were not by reference to the rent procedure regulation. I requested the advice and help of Mr. Wemkin in that respect and asked him if administrative procedure had been exhausted and he informed me in his opinion it had. I know any conversation with Mr. Wemkin does not bind the rent controller or anything of that kind, but it is my understanding from these procedure regulations that the method of appeal is alternative and that it is possible—I would like to go through this with Mr. Donohue and find out just these two alternative methods of the review of administrative process.

Mr. Donohue: First I would like to say this. I have here a letter dated January 2, 1948, in which the former counsel for Mrs. Ginocchio was advised of the procedure which she could follow to file an application for review. That letter is dated January 2, 1948. Our records would indicate that in response to that question no action has proceeded beyond the order of the Area Rent Director. The letter is addressed to Mr. Richards by the Regional Rent Administrator and reads:

“This will acknowledge receipt of your letter of December 20, 1947, addressed to Mr. Cox, and at-

taching a complaint concerning the [79] rejection by the Reno Defense-Rental Area of Application for Decontrol filed by the landlord. "We note that this complaint was addressed to the Reno Rent Advisory Board.

"We do not find sufficient facts stated in the complaint to be able to determine whether or not the action of the area rent office was correct. We are writing to the area office today for a report and as soon as we receive their reply we will communicate with you further.

"For your information, Rent Procedural Regulation 1 sets for the procedure for filing appeal from decision of the area rent director. We attach a copy hereto and call your attention to Section 840.23 providing for filing of an Application for Review to be conducted by the Regional Rent Administrator. Form D9 for that purpose may be obtained in the area rent office.

"Subpart B, Section 840.25, sets forth the procedure for filing an appeal with our Washington office."

In response to that letter, no appeal was ever filed. Now that is where our records indicate the matter.

Mr. Wilson: Under these regulations, Mr. Donohue, we had, as I gather, 60 days for review, 60 days within which [80] to apply for review.

The Court: Which regulations are you referring to now, Mr. Wilson?

Mr. Wilson: I am referring to Rent Procedural Regulation 1, September 4, 1947. That is the name

of the document. Now the order from the Area Rent Advisory Board denying the defendant's petition is dated November 25, 1947. This action, so far as I am aware, was filed on January 24, 1948. I guess that would be 60 days, although this date of the order, I doubt very much if it was communicated within that period of time. It would appear that this action was probably filed on the 60th day after the entry of the order denying the petition. Now under Section 840.23 of the Rent Procedural Regulation, "application for review may be filed within 60 days after the issuance of the determination to be reviewed or within 30 days after the date of issuance of the order."

Mr. Donohue: Counsel, may I correct one impression I think is erroneous. As I originally stated, powers of the Board are merely advisory. The actual order rejecting decontrol was issued on September 9, 1947. After the Rent Advisory Board had advised the landlord that in their opinion they didn't think the accommodations were decontrolled, they then wrote this letter to the regional office, at which time the regional office advised them of the procedural requirements [81] for filing of review and I might state, with reference to the 60 days, it is not a limitation within which an application will be filed if there is any reasonable excuse for waiting beyond the period. In other words, if there is any merit to the application, even though the 60 days has expired in actual handling of the application for review.

Mr. Wilson: That was January 2nd your re-

gional office wrote the original letter to Mr. Richards and here we have order of Mr. Wemkin September 9th, we have the order of the Advisory Board on November 25th, the letter from your regional office on January 2nd and the filing of the complaint on January 24th. Your procedure contemplates the appeal to the Advisory Board, does it not? I find these regulations very confusing.

Mr. Donohue: No, as I stated, the powers of the Board were merely advisory. I think that was a big issue in the last Congress, whether they should be a board which would have the power to administer the act, or whether they were advisory, and I think Congress concluded if they were given absolute power it would perhaps be unconstitutional and therefore they were merely advisory. The landlord had the choice if he wanted to have official action either by the rent director or the advisory board. They are both local.

Mr. Wilson: Of course, we have this situation—we have the rent advisory board created subsequent to the order of [82] September 9th. There is correspondence in the file here that indicates that Mr. Richards requested a hearing before the Rent Advisory Board and there is correspondence indicating that the Rent Advisory Board was not created until immediately preceding this hearing, at which the defendant presented her application to the board. On September 19th, letter from Mr. Wemkin to Mr. Richards:

“In answer to your letter of September 17th:

“The Rent Control Board for the Reno area

is still incomplete. Governor Pittman made his recommendations to Mr. Creedon, and the appointments were made. However, two members, Mr. Stevens and Mr. Morgali, declined to serve on the Board.

“As soon as new appointments are made, and the Board is organized, I will advise you so that you may present your case to them.”

Then October 22nd, this from Mr. Wemkin to Mr. Richards:

“This is to advise you the Reno Rent Advisory board was organized last night, and Mr. Russell Mills was chosen as permanent chairman. The next meeting of the Board will be held Tuesday, October 28th, at 7:30 p.m. in the Area Rent Office, 131 West Second St.

“The Board last night adopted a resolution [83] that all matters presented to them must be in the form of a written complaint signed by the plaintiff. This complaint will have no particular form, but should set forth all facts relative to the case.

“If you will prepare Mrs. Ginocchio’s complaint and address it to the Reno Rent Advisory Board, Box 821, Reno, Nev., it will be considered at this meeting.

“Very truly yours,

“CHARLES WEMKEN,
“Area Rent Director.”

That complaint was apparently prepared. Now

here is November 10, 1947, to Mr. Charles L. Richards:

"This is to notify you that the next meeting of the Rent Advisory Board will be held in the Reno office of Rent Control, 131 West Second St., Thursday, November 13th, at 7 p.m.

"You and your client, Mrs. Ginocchio, may be present at that time to present such facts as you deem pertinent in this case.

"Very truly yours,

"CHARLES WEMKEN,
"Area Rent Director."

Now we come down to February 10th and we have letter from the Regional Rent Examiner to Mr. Richards:

"This is in further reference to our letter to [84] you dated January 2, 1948.

"Upon investigation, we find that the proceedings in the area rent office were handled in accordance with the Rent Regulations and an interpretation of the regulation by the Regional Rent Attorney.

"As suit has now been filed, decision in this case rests with the court.

"Yours very truly,

"WARD COX,
"Regional Rent Administrator."

I find in letter addressed to Mr. Cox by Mr. Richards, this is December 20th:

"I am writing you on behalf of my client, Mrs.

Ginocchio, re the above subject matter. She has requested that I do so as a result of a conversation between you over the phone, wherein you requested a copy of my Complaint together with 'points' and 'citations' presented to the Office of Rent Control in Reno.

"You will have herewith copy requested.

"Hoping it meets with your satisfaction. Should you need any further service from me I shall be pleased to make an effort that will in any way bring about some semblance of justice as to the present situation. [85]

"Awaiting any word at any time, I remain, * * *"

Mr. Donohue: I might say to the court in the Gates vs. Woods case it went further on to say:

"The rule as to the exhaustion of administrative remedies applies just as forcibly when, as here, the contention is made that the administrative agency lacked jurisdiction over the subject matter."

We do not contend there is no jurisdiction in this court to determine whether these accommodations are covered by the act. We merely say that in the instant case that rule as to exhausting administrative remedies applies and administrative remedies have not been availed of in the instant case and that to approve that issue in this court, as the court said in the Gates case, would render chaos in the courts.

The Court: Now in this decision, Mr. Wilson—I am not speaking with the idea of deciding any question, but just at the present time to call your attention to some of this language here to see if

it would clear us up any. In this case the court says that:

“Section 204(b) of the Act provides that ‘the Housing Expediter shall, by regulation or order, make such adjustments in such maximum rents as may be necessary to correct inequities * * *,’ and Section 204(d) authorized the Housing Expediter to issue such regulations and orders as he deems necessary to carry out the policy in rent control enunciated by Congress in the Act.”

Now that would be the basis of authority for orders in this case.

Mr. Wilson: Yes, your Honor.

The Court (Continues reading):

“Accordingly, the Housing Expediter has laid down in the Controlled Housing Rent Regulation an elaborate set of rules for rent increases, adjustments and other determinations. Furthermore, in Rent Procedural Regulation 1 (12 F.R. 916, 5923) an orderly, simple and efficient procedure is prescribed for the Office of Rent Control, Office of the Housing Expediter, in making the various kinds of determinations in connection with establishment of maximum rents.”

See if that is in the procedure that governs the present situation: “an orderly, simple and efficient procedure is prescribed * * *.” Now, it seems to me in *Gates v. Woods* it deals with the same questions of orders and regulations we are concerned with in this case.

Mr. Wilson: Yes, I have read this case and I have read the United States Supreme Court case

cited therein as authority for the rule and that aspect of this case perturbed [87] me greatly when I first received this file from Mr. Richards and I at once made inquiry as to whether or not these administrative procedures had been followed and——

The Court: Do you mind if I interrupt again?

Mr. Wilson: No, please go ahead.

The Court: Now what have we here in this case in the way of application for orders and orders and applications for review? For instance, there was no doubt a registration of this case, wasn't there, a rent registration?

Mr. Donohue: There was an application for decontrol and then a somewhat inconsistent action on the part of the landlord. They then filed a registration in one instance, making application for decontrol without subjecting themselves to the rent.

The Court: We might confine ourselves to the application for decontrol at present. There was an application for decontrol?

Mr. Donohue: Yes, your Honor.

The Court: Then the order of the area rent director, Mr. Wemken, denying that application. Now there was no appeal then, was there, to the regional rent administrator and from there to the housing expediter?

Mr. Donohue: No, your Honor.

Mr. Wilson: The only thing that might be considered to be such remedy, there was application to the area rent advisory [88] board. That application and hearing, etc., between the rent advisory

board and Mr. Richards and Mrs. Ginocchio occupied the time between September 9th and November 25th. Then on December 20th, in response to the request from Mr. Ward Cox, the regional rent controller, Mr. Richards forwarded his complaint and that document is entitled——

The Court: Before we go any further than that, Mr. Wilson, wouldn't it be well to find out from the regulations and from the statute the powers and duties and jurisdiction of this rent advisory board?

Mr. Donohue: I might say that that particular thing is covered in Section 204(e).

The Court: That would be what section of this housing rent act of 1947?

Mr. Donohue: I do not have the cross reference. It would be about the second section.

The Court: It is Section 1893 of Title 50 Appendix.

Mr. Donohue: The function, if I might state, your Honor, of the advisory board was more or less a general one to determine decontrol of the entire rent areas, to consider general adequacy of the rent level. It made no attempt to administer nor was it empowered to—it could not have been empowered and be constitutional—to actually perform the functions of rent control. The power was vested in the area rent director. [89]

The Court: There might be a question here as to whether or not this defendant was somewhat misled by this correspondence and referred this matter to this advisory board. There was adverse

action by this advisory board. I mean, there was action against the defendant.

Mr. Donohue: That is correct.

The Court: And when was that order?

Mr. Donohue: They were notified by letter dated November 25th.

The Court: Was there any provision for any appeal from that?

Mr. Donohue: There being, as I say, no power lodged in the board to make a positive decision, there was no appeal.

The Court: The question before the advisory board then was not an order refusing the decontrol these premises. It was a question of consideration by that board whether or not they recommend to the administrator that his former order be revoked or rescinded?

Mr. Donohue: Yes.

Mr. Wilson: Had something of that sort been the recommendation and there had been a provision, or let us say the recommendation, to modify the order, then there would have been action to be taken by the area rent office, but there wasn't. It was a confirmation that had theretofore been taken by the rent office and I would be inclined to construe [90] this as being the termination of the proceedings before the area rent office, that is the office in Reno. Now we find that on December 20th a copy of the proceedings and complaint, etc., that was presented to the area rent office advisory board was then sent to the regional office. Now strictly speaking, it isn't designated as appeal or

anything of that kind, but the subject matter of the complaint, I would say, was sufficient to present a matter to the regional area director. Then we find that on——

Mr. Donohue: Just a moment, counsel. As pointed out in the letter of January 2nd, it is noted that the complaint is addressed to the Reno Rent Advisory Board and was merely a copy of the complaint which was considered by the Rent Advisory Board.

Mr. Wilson: Well, subsequent to that time, and after the filing of this action, Mr. Cox, through his office, advises Mr. Richards that: “* * * Upon investigation, we find that the proceedings in the area rent office were handled in accordance with the Rent Regulations and an interpretation of the regulation by the Regional Rent Attorney.” Now, true, it does not say that “your appeal is denied,” but it certainly shows that they had before them the record, they considered it and they found that the action of the area office was in accordance with the regulations and with the interpretation of the regional rent attorney. [91]

The Court: Now let us take your theory for a moment. I think I see what you are driving at. I see, too, where the submission of this question to the local advisory board was encouraged by the action of the office of housing expediter or his subordinates in this correspondence. Now let us assume then that they might be somewhat excused for failure to follow this regulation that would require appeal to the regional rent director and then from

there to the expediter. It is evident that the office of housing expediter or regional director or someone cooperated with the defendant in getting this matter before the local advisory board. What for? It could be that by that cooperation of the office of housing expediter or any of his subordinates, this defendant could have overlooked or could have been blinded as to these regulations or procedures fixed by the regulations for appeal of the order of the area rent director to the regional director and to the superior office. Now if you take that as being fact, then what was the date of this order of this local advisory board recommending that the original order of the local rent director stand? That was the order, wasn't it? The local advisory board gave no relief here. They sustained the order of the area rent director. Now that was in November——

Mr. Wilson: November 25th. [92]

The Court: Now then we are right back to where we started from. We have from that date an order of the rent director refusing to decontrol these premises. The time for appeal to the regional director should run from that date in fairness to this defendant, should run from the date that the local advisory board acted, because the action before the local advisory board was taken by the defendant with the help and assistance of the regional rent director or his superiors and they could have been lulled into a feeling of security, whereby they might not have taken advantage of their right to appeal to the regional director within

the time prescribed by the regulations. You see what I mean. Let us start from there. Consider that the order of the area rent director, refusing to decontrol, dates from the date of the order of the rental advisory board, which was November 25, 1947. Now from that date on there was a time for appeal under this regulation, and had the defendants taken advantage of their right to appeal since that time, they had a right to appeal, in my opinion. I think that they would have on account of the cooperation of this office of housing expediter with this procedure before this local advisory board. In other words, they were encouraged and helped by the office of housing expediter to present this matter to the local board and the local board confirmed, you [93] might say, the views of the area rent director. Then as far as we are concerned for beginning of the time for application of administrative remedies, we should consider beginning of that time as November 25, 1947. Now what would be the present rights of this defendant today under that situation?

Mr. Wilson: Well, now, let us take the next step, that apparently on December 20th there was a telephone conversation between Mr. Cox and Mr. Richards and Mr. Richards communicates with Mr. Cox and says: "Pursuant to our telephone conversation today, I am forwarding you a copy of my citations——"

The Court: Mr. Cox is the regional director?

Mr. Wilson: He is the man to whom this appeal would be directed.

The Court: On December 20th Mr. Richards informed him of sending him——

Mr. Wilson: The copy requested is the language used in this letter:

“I am writing you on behalf of my client, Mrs. Ginocchio, re the above subject matter. She has requested that I do so as a result of a conversation between you over the phone * * *”

Evidently that would be conversation between Mrs. Ginocchio and Mr. Cox:

“* * * wherein you requested a copy of my complaint [94] together with ‘points’ and ‘citations’ presented to the Office of Rent Control in Reno.

“You will have herewith copy requested.”

Now the copy is sent and on January 2, 1948, the regional office writes Mr. Richards:

“This will acknowledge receipt of your letter of December 20, 1947, addressed to Mr. Cox and attaching a complaint concerning the rejection by the Reno Defense-Rental Area of Application for Decontrol filed by the landlord.

“We note that this complaint was addressed to the Reno Rent Advisory Board.

“We do not find sufficient facts stated in the complaint to be able to determine whether or not the action of the area rent office was correct.”

The Court: Now stop there. Wouldn't it be only fair to the defendant to consider that the defendant had appealed to the regional director?

Mr. Wilson: All right. Now this next sentence I think will strengthen that:

“We are writing to the area office today for

a report and as soon as we receive their reply we will communicate with you further.

“For your information, Rent Procedural Regulation 1 sets forth the procedure for filing appeal from decision [95] of the area rent director. We attach a copy hereto and call your attention to Section 840.23 providing for filing of an Application for Review to be conducted by the Regional Rent Administrator.”

The Court: What is the date of that letter?

Mr. Wilson: This is January 2nd.

The Court: Now I would take it from that letter—I want to go along as we go over these, if you don't mind, see if we can all of us agree on the proper interpretation of this letter and the regulations. Now in view of that letter, calling the attention of the defendant in this case, Mrs. Ginocchio, to the regulation providing a means for an appeal, then this rent control, this regional director, did not treat this matter as an appeal, but gave the defendant notice of this regulation, so I would say that the opportunity to appeal to the rent director or to the regional director, the time within which that might be done, would run now from January 2, 1948.

Mr. Wilson: Yes, but in this same letter it says: “We are writing to the area office today for a report and as soon as we receive their reply we will communicate with you further,” indicating there would be something else from the regional office in the way of a further communication. Now the next communication that I find on this matter is Feb-

ruary [96] 10th. That is aside from the service of the complaint and summons in this matter, because on February 10th after this action is filed we have this letter:

“This is in further reference to our letter to you dated January 2, 1948.”

Now that is to say that this is the letter that we said that we would send later or communicate later, after receiving the record from the area rent office. This must be the one. It is the only one I could find:

“This is in further reference to our letter to you dated January 2, 1948.

“Upon investigation, we find that the proceedings in the area rent office were handled in accordance with the Rent Regulations and an interpretation of the regulation by the Regional Rent Attorney.

“As suit has now been filed, decision in this case rests with the court.”

The Court: That leaves the court in a very difficult place. This is a suggestion merely—it may be that we cannot consider that this defendant has failed to take advantage of administrative remedies. The correspondence with the regional rent director, he worked with the defendant in getting this matter before him and then after this case was filed, he decided the case against the defendant, to the same extent and with the same effect, I [97] believe, that a decision by him of the same nature would be made if they had come to him in the regular course of this regulation. Do I make myself clear?

Mr. Donohue: Assuming that is true——

The Court (Interrupting): Suppose in carrying out the procedure laid down by the regulations—the decision of the regional rent director in this case was made February 10th, 1948, and the suit was filed January 24, 1948, suit being filed then at a time when the defendant still had an administrative remedy—can the office of housing expediter cut this defendant off and deprive the defendant of recourse to administrative remedy by rushing into court before the time has elapsed for exercise of the remedy? Those are some of the questions presented to me. What do you think of that, Mr. Donohue? Why did this rent regional director, to use an ordinary expression, fool with this case until it was properly before him? He evidently did and he decided it, so if he decided it, he must base his decision upon the procedures. At least, he must have considered that the case was properly before him.

Mr. Donohue: Is there anything to preclude the exhaustion of administrative remedies, even after suit is filed?

The Court: Of course, you might have this thought, too. The regulations, as you said earlier, are advisory. If the housing expediter did not bring the suit or situation [98] could be foreseen where he did not bring suit in the same state of affairs that we have here before the time for the use of administrative procedures had passed, that limitation of the statute might occur. Is that possible?

Mr. Wilson: No, because this lease is dated the 30th day of July, 1947. The term commences on the first day of August, 1947. The limitation is a period of a year.

Mr. Donohue: The question goes a little deeper than that, I think. The question is that there is a properly constituted authority to determine these questions, procedures set up for review of those authorities. Ignoring those procedures, they proceeded in accordance with their own determination.

The Court: With the help and connivance of all officers of the housing expediter having to do with the case.

Mr. Donohue: It was an original order, stating that these accommodations are not decontrolled. During all these negotiations there is an order which has rejected the decontrol.

The Court: And then there is a confirmation of that order by the regional rent director February 10, 1948, and he can do no more than that. So what position does he leave these people in? Why didn't advice about that regulation procedure come at the moment that the local advisory board was referred to? [99]

Mr. Donohue: I do not know. Mr. Wemken is here. He might be in position to state whether or not this landlord was advised in the area office of her rights to appeal. Frankly I might state this is the procedure. Some landlord will choose to go to the rent advisory board and another landlord will choose to pursue those proper appeal remedies.

The Court: All right, let us stop there a mo-

ment. Suppose this landlord came into Mr. Wemken's office and had in mind this advisory board and wanted that board to pass on it. Now if it was a fact under the law time was running against an appeal to the regional rent director, which could have been flittered away by fooling around with this local advisory board, it was the duty of somebody to get this defendant on the right track. Now maybe it wasn't the duty. They were not required, perhaps, to go that far, but when they cooperate with the defendant and suggest the type of complaint to be filed with this local advisory board and all that, thereby permitting this time to run along, can the defendant, after the conclusion of action by the local advisory board then, after conclusion of the review authorized by the regulations or otherwise of the regional director, can this defendant be then said to have failed to exercise administrative acts? I do not think so.

Mr. Donohue: He had a direct appeal to the national [100] administrator. He had an appeal yet to the regional administrator.

The Court: This beginning of the time, in my judgment, would run from February 10, 1948, when the regional director announced his decision sustaining and approving of the order of the area rent director. Do you see the point I have in mind?

Mr. Donohue: I do, but I think that the rule as to exhaustion of administrative remedies is more or less a rule of thumb. As I say, the constituted authority to make these determinations is first of all the local director, with the help of the rent advisory

board, the regional office, the national office. It is a question of whether they are going to administer the provisions of the act or whether those provisions of the act are going to be administered by the courts. That is the purpose of the rule of exhaustion of administrative remedies. We do not maintain this court does not have any jurisdiction because certainly it has, but I think the rule of exhaustion of administrative remedies, even assuming up to the time the regional office said that in their opinion they thought it was in accordance with the regulations, that they had not exhausted their administrative remedies.

Mr. Wilson: I think this rule of exhaustion of administrative remedies is well considered and fully discussed in the United States Supreme Court report cited in this particular case.

The Court: Just a moment. It is claimed here now that the defendant has failed to exhaust administrative remedies. From the discussion we have had here and expressions made, I do not believe that the defendant could be held to have failed to have exhausted administrative remedies because I believe from February 10, 1948, when the regional director announced that the order of the area rent director was approved, that from that time on the time for taking appeal began to run, an appeal from the regional rent director to the housing expediter, and this suit was brought against the defendant when there was still time to appeal to the housing expediter. Now what position does that leave us in?

Mr. Wilson: I have no authority to cite to the court in that respect.

The Court: Doesn't that kind of perplex you, Mr. Donohue? Doesn't it amount to this, that this regional rent director has given a decision on the very subject matter that he would have decided if there had been an appeal perfected under the regulations and if he did, the time to appeal from his decision runs from the date he gave his decision. Now can you clear that matter up in my mind? So if it is urged here by the government that because the defendant has failed to exhaust his administrative [102] remedies that this court should not consider the legality of the order, now we are up against another proposition, and I think it will block the defendant right in his tracks. An order of the rent director or an order of any of these officials, made pursuant to regulations, can only be reviewed in the emergency court of appeals, can't it?

Mr. Donohue: That was true under the former act. The rule here I am urging is similar to that proposition. However, we do not contend there is no jurisdiction in the court to rule on the question of whether these premises are decontrolled or not decontrolled. Our position merely is that the court shouldn't do so where the defendant has failed to exhaust his prescribed administrative remedies.

The Court: If that point was suggested as objection to the proceeding, I am going to overrule the objection on the ground stated, because I do not believe this defendant can be held as having failed to have exhausted administrative remedies at the

time this suit was brought, because from February 10, 1948, the time began to run within which an appeal could be taken to the housing expediter. Now let us start from there.

Mr. Wilson: In order to keep the record straight with respect to this, is it the court's desire I introduce in evidence these various letters and documents, copies of which I [103] have?

The Court: I think it would be well to do so.

Mr. Donohue: To save time perhaps likewise may we stipulate that the orders in question, which we referred to, say for example the order rejecting the decontrol, which is the formal order, will be introduced?

Mr. Wilson: I certainly will be glad to stipulate as to the introduction of all those documents.

Mr. Donohue: The order adjusting the maximum rent for the premises to accompany the various letters which you refer to.

The Court: There never was any action after February 12th that could be considered as administrative procedure prescribed?

Mr. Wilson: None whatever.

Mr. Donohue: We will offer the order rejecting the decontrol report and order establishing the maximum rent.

The Court: That will be government's Exhibits 1 and 2 in that order.

Mr. Donohue: We will offer also the rent advisory board's letter which sustained the rent director in his determination.

The Court: Exhibit 1 is order rejecting decon-

trol report. Exhibit 2, order adjusting maximum rent, dated December 12, 1947. Suppose we take a recess now.

(Recess taken at 11:45 until 1:30 p.m.) [104]

Afternoon Session—1:30 p.m.

The Court: I wonder if it would be well to go over some of the matters that we discussed here this morning and see if we are on the right track. I had in mind that perhaps we could begin now as if no orders had been made of any kind in regard to whether or not the defendant had exhausted administrative remedies. I would like to kind of get the views of counsel as to what the situation is after all this discussion we have had. Now I think Mr. Donohue stated that the procedure in regard to the review of administrative orders of the emergency court of appeals has been changed. Now this action was brought after the termination of the emergency price control act, wasn't it?

Mr. Donohue: Yes, your Honor.

The Court: And the acts out of which this action grows were all had after the expiration of that act?

Mr. Donohue: That is correct.

The Court: They are not at all affected by what you might call the old law?

Mr. Donohue: That is correct.

The Court: They are entirely under this act called Housing and Rent Act Act of 1947?

Mr. Donohue: Yes.

The Court: Now I was looking at the case of Woods vs. Hills, Supreme Court of the United States case, decided [105] May 10, 1948, where orders were made—one order was made during the period of time of the operation of the emergency price control act and one was made subsequent to that time.

Mr. Donohue: I was on the brief in the Circuit Court of Appeals in that particular case. I believe appeal involved construction of 200(d) of the emergency price control act though the opinion was in 1948.

The Court: So that would have nothing to do with our present situation, would it?

Mr. Donohue: No, that was purely under the emergency price control act.

The Court: So what is your contention now, Mr. Donohue? Do you contend that the court now has or has not authority to consider the legality of the order rejecting the application for decontrol?

Mr. Donohue: The position that we are urging is that the defendant, having failed to exhaust his administrative remedies, should not be heard in this court in a suit brought to enforce compliance with the regulations and orders as issued, should not be heard in this court to raise a defense, that the order is improper, having failed to exhaust his administrative remedies and that jurisdiction which is conferred upon the court as to determination as to whether there has been a violation here, and would necessarily perhaps involve the question [106] of determination as to whether, in this court's decision,

it would grant the relief sought wouldn't necessarily follow by consideration of the equities of the particular situation, but the particular defense—in other words, the purpose as expressed there by the Circuit Court in the case of *Gates vs. Woods*, this statement, “it would cut the heart out of administrative action and lead to chaos in the courts.” The administrative agency is the properly constituted authority to determine and administer the act and regulations, where certain prescribed administrative remedies have been set forth, and those have not been followed. Now giving the court's credence to the fact that a review was probably had through the back door of the regional office, the prescribed administrative remedies nevertheless were merely half was exhausted in that event, assuming that there was a sort of, as I said, a back door review of the particular case, and our position is that merely that question should not be gone into in this court, because otherwise the court would be performing the function which is prescribed under the law that the housing expediter should administer. Whether they have exhausted all prescribed administrative remedies——

The Court (Interrupting): Just for information—it can't change any rule appearing here, but under the present circumstances, assume the defendant exhausts his remedies before the administrator, then would this court have jurisdiction? [107]

Mr. Donohue: Yes, I think it has, undoubtedly.

The Court: There is no such thing as hearing in emergency court of appeals any more?

Mr. Donohue: No, your Honor. The function is generally limited to board administration and when the recommendation is made by the advisory board to the administrator and he denies it, for example, for a general rent increase or a decontrol of an entire area, and the administrator fails to comply with the recommendation of the advisory board, the matter may then be presented to the emergency court of appeals.

The Court: The question involved in the application for decontrol and the question which the defendant would like to have the court consider now is the applicability of Section 1892 of the rent control act, is it not, where it defines different terms and the term "controlled housing accommodations" means housing accommodations in any defense rental area except that it does not include:

"(1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of [108] furniture and fixtures, and bellboy services; or

"(2) any motor court, or any part thereof; any trailer or trailer space, or any part thereof; or any tourist home serving transient guests exclusive, or any part thereof; or

"(3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing ac-

accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families * * *"

Is that the burden of the contention, that the administrator's office, that the rent control order refusing to decontrol, if we might use that term, was illegal?

Mr. Wilson: Not justified by the statute, was beyond the scope of the authorization conferred upon the administrative body by the statute.

Mr. Donohue: In that connection, again referring to the language of *Gates vs. Woods*:

"The Housing Expediter is expressly empowered to issue regulations and orders to adjust maximum rents and to determine which housing accommodations in a defense-rental area are 'controlled' and which are excluded by Sec. [109] 202(c) * * *"

The Court: Section 202(c) of the act is what?

Mr. Donohue: The section you have just read.

(Continuing): "* * * of the Act from the term 'controlled housing accommodations.'

"The rule is well settled that a person must first exhaust the prescribed administrative remedy before he can seek any relief in the courts.

"The rule as to the exhaustion of administrative remedies applies just as forcibly when, as here, the contention is made that the administrative agency lacked jurisdiction over the subject matter."

That is exactly the contention which is raised here. I was reading from part of the court's opin-

ion which I have excerpt from in the case of *Gates vs. Woods*.

The Court: I have in mind—I can't get it out of my mind—the result of our discussion here this morning, that this defendant has in a sense cooperated with the area rent control director, submitted the matter to the advisory board, and then followed the instructions of the regional rent director, prepared a complaint and submitted it to the advisory board and subsequently, on February 10, 1948, the regional rent director made a decision. Now [110] you see this language we have here in this case, *Gates vs. Woods*, it points out a case that hasn't those elements that we have here. It goes on to say:

“The plaintiffs have not even attempted to avail themselves of these administrative remedies. They argue that the rent director has exceeded his jurisdiction and that a full investigation would have disclosed that the property in question was decontrolled. The plaintiffs, however, did nothing to bring the facts concerning the property to the attention of the rent director; rather they rushed into the State Court and sought an injunction to checkmate the Housing Expediter and his subordinates from carrying out the duties imposed upon them by the Act. To sanction such procedure on their part would cut the heart out of administrative action and lead to chaos in the courts.”

Do you notice the difference, Mr. Donohue?

Mr. Donohue: I realize that is a much stronger case.

The Court: There they disregarded all the offices

of the housing expediter, from the area rent control director all the way through and immediately rushed it to the State court, without any attempt to even consult the administrator. Now in this case here this defendant has [111] been at all times willing and has conferred with and sought the advice from the office of housing expediter and his assistance and has received a decision from the regional director on this point. That is true, isn't it?

Mr. Donohue: Yes, but the administrative process doesn't stop there.

The Court: I know. They did proceed, perhaps, wrongly as outlined by the applicable regulation, but it was a mutual fault there. It seems to me that if the housing expediter is going to take advantage of the failure to follow that regulation, which he evidently intends to do by insisting now that these people should be held as not having pursued administrative remedy, he should have at an earlier stage than this, instead of considering their case and going into the merits of it and giving them a hearing; in the meantime precious time under the regulation was passing. In am going to hold that administrative remedies have been exhausted, and I will do so under my views or the meaning of this case of *Gates vs. Woods*. I can easily see the court's thought in the case of *Gates vs. Woods*, where the plaintiffs in that case, in similar position as the defendants here, ignored the order of the rent director, they ignored the regional director, they ignored all of the officers of the housing experiter and threw it post-haste into the State court, to try to [112] prevent

the operation under the law and regulations of the housing expediter. Doesn't it strike you, Mr. Donohue, it wouldn't be just to say that this defendant should be considered as a person violated the regulations and the procedure outlined for relief from these orders?

Mr. Donohue: Of course throughout, right from the very beginning, these people were represented by capable counsel and when this order was issued rejecting the decontrol report on September 19th a letter written to Mr. Wemken by Mr. Richards——

The Court: Well, right there, I should think in a spirit of fairness that some member of the housing expediter would have told those people if they intend to seek any relief from that order that they had to pursue these administrative remedies.

Mr. Donohue: I do not want to urge this matter at any further length upon the court. I feel that they were fully advised throughout and this letter indicates he does not want to take up with the regional office or his local board. He apparently has been advised to proceed on appeal as indicated. I do not want to urge this point at too great length on the court. It appears to me this is burden which courts were not intended to carry. Now if the court wishes to take the time to decide—as a matter of fact, the problem involving this decontrol is probably a much greater problem than we have in deciding [113] whether he has exhausted administrative remedies.

The Court: It is a question of determining whether on February 1, 1947, if this housing accom-

modation was of a character not included by Section 1892.

Mr. Donohue: As I say, I do not want to urge this point any further upon the court if the court feels there has been sufficient——

The Court: I can't get away from the idea the regional director made a decision in this case on February 10, 1948. I think there is no dispute on it.

Mr. Donohue: I think they went in the back door.

The Court: It doesn't make any difference whether he handed it to him through the back door or the front door, he handed them a decision.

Mr. Donohue: There is no question about that.

The Court: And they had an opportunity then, of course, to petition or appeal to the office of housing expediter, didn't they?

Mr. Donohue: Yes.

The Court: But the action had already been brought, so I am going to hold now that the defendants in this case have not failed to follow the administrative procedures. I base that wholly upon my finding and the records and exhibits that Mr. Ward Cox, regional administrator, gave a decision sustaining the validity of the order rejecting decontrol [114] report on February 10, 1948, after the filing of this action January 24, 1948, and upon the further finding that several months prior to that time, with the cooperation and assistance of the officers of housing expediter, this defendant presented their objections to the order rejecting the decontrol report to the advisory board of this rental district,

that all of these steps were taken by the defendant with the full knowledge of the officers of the housing expediter and with their assistance and cooperation.

Mr. Donohue: We offer the following exhibits:

Ex. 1—Order rejecting decontrol report issued September 9, 1947.

[Printer's Note: Plaintiff's Exhibit No. 1 is set out in full at page 115 of this printed Record.]

Ex. 2—Order adjusting the maximum rent from \$55 to \$180 per month, issued December 12, 1947.

[Printer's Note: Plaintiff's Exhibit No. 2 is set out in full at page 118 of this printed Record.]

Ex. 3—Request for opportunity to present law to the rent advisory board. Letter dated September 17th of Mr. Richards to Mr. Wemken.

[Printer's Note: Plaintiff's Exhibit No. 3 is set out in full at page 119 of this printed Record.]

Ex. 4—Two registration statements for the premises described as 415 East 8th Street, Reno, Nevada.

Ex. 5—Order adjusting the maximum rent from \$55 to \$57.50, issued November 8, 1946.

[Printer's Note: Plaintiff's Exhibit No. 5 is set out in full at page 120 of this printed Record.]

Ex. 6—Letter of the rent advisory board to Mr.

and Mrs. Ginocchio, in which they recommended their filing a petition and agreed with the determination of the rent director that [115] accommodations were not decontrolled. The substance of it was they had not, in their opinion created additional housing accommodations and the proper procedure for them to follow would be to file a petition for adjusting with the regional rent director.

[Printer's Note: Plaintiff's Exhibit No. 6 is set out in full at page 121 of this printed Record.]

The Court: That amounts to rejecting their application.

Mr. Donohue: That the accommodations be decontrolled.

The Court: The effect of that is that they rejected the application of the defendants for decontrol.

Mr. Donohue: They went to the advisory board to have the advisory board make a recommendation to the rent director after presentation of their case to the rent advisory board and they advised the landlord they were recommending the accommodations be not decontrolled and recommended to him that they file a petition for adjustment.

Mr. Wilson: Defendant's Exhibit A is a letter of August 13, 1947, from Mr. Wemken to Mrs. Ginocchio, stating that Mr. Goldbaum, one of the regional rent attorneys advised that the proper procedure to be followed by Mrs. Ginocchio would be to file a petition for an adjustment in rent and re-

quested Mrs. Ginocchio to complete the enclosed forms and return them to his office.

[Printer's Note: Defendant's Exhibit A is set out in full at page 109 of this printed Record.]

Exhibit B, letter of September 19, 1947, Mr. Wemken to Mr. Richards, advising the rent control board is incomplete, [116] stating that as soon as the board is organized Mr. Richards will be notified so that he may present the case.

[Printer's Note: Defendant's Exhibit B was read into evidence at page 42 of this printed Record.]

Now Exhibit C is a letter October 22, 1947, Wemken to Richards, advising that the Reno advisory board has been organized and requesting that a written complaint be filed for the consideration of the Board on October 28th.

[Printer's Note: Defendant's Exhibit C was read into evidence at page 43 of this printed Record.]

Exhibit D is a letter of November 10, 1947, Wemken to Richards, advising that he may be present before the advisory board on November 13th and present pertinent facts.

[Printer's Note: Defendant's Exhibit D was read into evidence at page 44 of this printed Record.]

Exhibit E, letter of December 20, 1947, Mr. Richards to Mr. Cox, enclosing copy of the complaint

filed with the advisory board. That was pursuant to telephone conversation.

[Printer's Note: Defendant's Exhibit E was read into evidence at page 44 of this printed Record.]

Exhibit F is a letter of January 2, 1948, from Mr. Cox to Mr. Richards, advising that the regional office requested a report from the area office and promising further communication upon receipt of that report.

[Printer's Note: Defendant's Exhibit F was read into evidence at page 39 of this printed Record.]

Exhibit G, letter February 10th, Cox to Richards, upholding proceedings by the area office.

[Printer's Note: Defendant's Exhibit G was read into evidence at page 44 of this printed Record.]

Exhibit H is a tracing showing the plan of the accommodations numbered 415 E. 8th Street and referred to ingovernment's Exhibit 4, together with—

Mr. Donohue: May I interrupt just one moment. I think it might be well, for the purpose of the record, to state by whom it is made and what relationship, if any, to the defendant. [117]

Mr. Wilson: We will be glad to do it. Together with a floor plan of the premises known as 415½ East 8th Street, this plan having been prepared by William Ward, contractor, Reno, Nevada, the recently deceased father of the defendant.

Exhibit I is original tracing of the premises which are the subject of this litigation, prepared by the same individual.

Exhibit J is original tracing of the basement of the premises, the subject of this litigation, prepared by the same person.

Mr. Donohue: Counsel, with reference to that, may it also be stated it is not drawn at the same scale?

Mr. Wilson: It may be. These are a quarter inch scale. Exhibit K, the original lease dated July 30, 1947, between the defendant as lessor and Matthew S. Weiser and Helen A. Weiser, lessees.

Now, Mr. Donohue, may we stipulate that Exhibits H, I, J and K may be withdrawn and copies substituted therefor? In other words, blue print copies of H, I, J and a true copy of K?

[Printer's Note: Defendant's Exhibit K is set out in full at page 110 of this printed Record.]

Mr. Donohue: I would so stipulate, subject to the qualification that the court view of original and when it serves his purpose these may be substituted.

Mr. Wilson: Subject to that qualification. For [118] your purpose in this matter, I had better give you copies of these blueprints so you will have them for reference. (Hands copies of blueprints to counsel.)

CHARLES WEMKEN,

a witness for the plaintiff, being first duly sworn, testified as follows:

(Testimony of Charles Wemken.)

Direct Examination

By Mr. Donohue:

Q. State your name please.

A. Charles Wemken.

Q. And by whom and what official capacity are you employed, Mr. Wemken?

A. I am area rent director for the Reno defense rental area.

Q. How long have you been employed in that capacity? A. Two years and eight months.

Q. Are you familiar with and have you personally inspected the housing accommodations described as 415 E. 8th Street, Reno, Nevada?

A. I am and I have.

Q. Now with particular reference to the accommodations, we will say prior to February 1st, do the records of your office indicate how those particular accommodations were rented about 1943 to 1946?

A. In two sections, a duplex. The owner occupied the rear portion, 415½. The front portion, 415 was rented.

Q. And just for the information of the court, will you state [119] what the premises at 415 were rented for? What rent, do you know?

(Question read.)

Q. According to the records in your office, what was the maximum for the tenant-occupied unit?

A. The rental was changed on that a couple of times, as I recall; \$57.50 and then reduced because the owner removed an ice-box, refrigerator.

(Testimony of Charles Wemken.)

The Court: Reduced to what amount, did you state, Mr. Wemken? A. \$55.

Q. For the purpose of refreshing your recollection, Mr. Wemken——

Mr. Wilson: I will stipulate that those were the rentals.

Mr. Donohue: If you look at the lower Exhibit C, that reflects that the original rent was \$45 as an unfurnished rental.

A. The original rental was \$45 per month unfurnished. That was filed January 15, 1943. Then it was re-registered on October 15, 1945. It was furnished and rental of \$57.50 and subsequently that reduction, due to the removal of the refrigerator, reducing it to \$55.

Q. And this document here reflects that last adjustment in rent, is that correct? [120]

A. That is correct.

Q. Now an application for decontrol was filed in your office——

The Court: Let me ask you a question. Those exhibits that Mr. Wemken used, they are exhibits, are they not?

Mr. Donohue: Yes.

The Court: I do not think you referred to exhibit numbers in that question.

Mr. Donohue: Exhibit No. 4, on which the witness testified the original rent at 415 E. 8th Street was \$45 was the under portion of Exhibit 4. The subsequent registration changed from unfurnished to fully furnished, which the witness stated was filed October

(Testimony of Charles Wemken.)

15, 1945, changed the maximum from \$45 to \$57.50, which is the upper portion of Exhibit 4, and the order which I handed the witness was order of November 8, 1946, decreasing the rent from \$57.50 to \$55, which the witness stated was reduced because of removal of refrigerator, that last order being Exhibit No. 5.

Q. Was an application for decontrol filed in your office for these particular premises, Mr. Wemken?

A. Yes.

Q. About when, if you recall, was that application filed?

A. I wouldn't be sure, but I believe it was probably after the middle of August, 1947. I don't recall the exact date.

Q. In any event, what happened as a result of that? Did you make a physical inspection of the premises? [121]

A. At that time?

Q. Yes.

A. Yes, I made an inspection of the premises and the owner was advised that in our opinion the property was not eligible to decontrol.

Q. What basis, if you recall, was the original application filed on? What was the claim made by the landlord as to the grounds for decontrol?

A. Because of it being conversion, creating additional housing accommodations, conversion having taken place after February 1, 1947.

Q. Now when you inspected the premises——

The Court: Let me get the significance of that again and the answer.

(Question and answer read.)

(Testimony of Charles Wemken.)

The Court: That would go to the reason why he declined the application. As I understand, the significance of that question and answer is that Mr. Wemken found that this conversion had taken place.

A. My answer was not to that effect. It was to the effect that those were the grounds that the landlord filed for petition for decontrol.

Mr. Wilson: I will ask counsel for the government to supply the original application, if he can do so, so that we may have direct reference to the application for those reasons. [122]

Mr. Donohue: I did not find that.

Q. At that time you personally inspected the premises? A. I did.

Q. And what particular changes did you find were made in the accommodations?

A. The duplex had been reconverted from the duplex to a single family dwelling.

Q. Now the net result of that, Mr. Wemken, was that prior to this conversion there were two separate and distinct dwelling units? A. That is right.

Q. And after the conversion there was one dwelling unit, is that correct? A. Yes.

Q. And from your inspection how was that particular conversion accomplished, or the particular change accomplished?

A. The house originally had been a single family dwelling and then by cutting in an outside entrance, this 415½, and closing off the front portion of the house and installing kitchens and baths, it had been made into this duplex, two separate housing units, and then when it was reconverted to a single family

(Testimony of Charles Wemken.)

dwelling, the door 415½ was changed to a window and the partitions that had separated the front portions from the rear portions were removed.

Q. In addition to that, did you observe any other particular [123] change had been made in the premises?

A. Yes, there had been what appeared originally to have been an open rear porch, had been one wall, enclosing it into a sort of sun room and one wall of one bedroom had been extended to make closet space and a new entrance north had been built on.

Q. Did you inspect the basement at the time?

A. Yes.

Q. And what, if any, changes had been made in the basement, according to your observation?

A. There had been a room partitioned off in one corner of the basement, making a sleeping room, and I believe the stairway leading to the basement had been moved from one position to another. I wouldn't swear to that, but I think so.

Q. Was the outside structure changed in any manner? Was the outside structure of the entire accommodation changed in any manner?

A. More by extension of the bedroom and the addition of the entrance north and then the closing in of that side or rear porch made minor changes, yes.

Q. And after your inspection you then issued the order which is plaintiff's Exhibit 1?

A. I issued the order.

Q. And on or about December 12, 1947, did you issue an order changing the rent in any way? [124]

A. Yes, an order was issued changing the rental

(Testimony of Charles Wemken.)

from what was the original registration of the front portion, the duplex, because of additional space and the additional rear portion of the duplex and furnishing of the entire unit and on the strength of some furnace work and several other things, I have forgotten all of them, rental was changed from \$55 to \$180 per month.

The Court: You mean for the entire unit?

A. For the entire unit, yes, sir.

Q. Would you recollect what particular section of the regulation that adjustment was made under?

A. It was under Section 5(a)(1), which is the substantial alteration or addition to the building itself and 5(a)(3) would be additional furniture and equipment.

Q. You previously examined Defendant's Exhibits H, I, J, and K, and I ask you to now examine those exhibits and ask you to state whether, in your opinion, they correctly reflect the changes which were actually made from your observation of the premises at the time of your inspection?

A. With the exception of the minor portion of this Exhibit J, which contains new foundation, and that was the original foundation under the original portion of the house, the rest of it, I think is correct.

Q. Would you point out that particular portion?

A. The portion of the wall. (Indicating.)

Q. That is in Exhibit J, the righthand corner, the portion [125] of the wall there. Would you state with reference to what?

A. I do not think that was new construction. That

(Testimony of Charles Wemken.)

was the original foundation in there, that east wall, when the house was built originally.

Q. Now the particular accommodations—I notice that your order is addressed to the tenant, Mr. Weiser—what particular accommodations, will you state if you know, were rented to Mr. Weiser? Was it a portion of the entire premises or was it the entire premises?

The Court: What order was issued to Mr. Weiser?

Mr. Donohue: The order dated December 12, 1947.

The Court: Fixing the maximum rent?

Mr. Donohue: Yes.

Q. What unit did that relate to?

A. The entire premises.

Q. And do you recall the number of rooms in those particular premises? A. No, I don't.

Q. In any event, the order did not apply to any of the particular rooms in the accommodations, but applied to the entire premises?

A. That is right.

Q. And fixed the maximum rent for those premises on the basis of the entire structure?

A. That is right. [126]

Cross-Examination

By Mr. Wilson:

Q. With reference to Exhibit H, which is the duplex as it existed under the registration as shown in government's Exhibit 4, we examine this blueprint, we find that the accommodations that were rented, that is, the front portion of the structure which was No. 415, consists of the entrance way lo-

(Testimony of Charles Wemken.)

cated on the south side of the building, is that not true? A. Yes.

Q. From there we progress into the living room, going east into a dinette, beyond the dinette to the north is a nook, dining nook, I presume, turning west the kitchen, continuing to the west bedroom, adjoining the bedroom is a bath and cellar stairs going into the basement from the bedroom. Do you recall how that unit was treated at the time, Mr. Wemken, when it was rented? A. No, I do not.

Q. Would it refresh your recollection if I were to tell you it was heated by floor furnace?

A. No.

Q. You have no recollection of that?

A. None whatever.

Q. Do you have any recollection of the building before it was constructed as a duplex as shown on that? A. None whatever.

Q. You have no recollection from your observation and record? [127]

A. The only information I have I secured from the city building inspector; it was originally a one-family house and made into a duplex.

Q. Do your records show that any portion of that duplex was rented other than this extreme southern portion which has been designated as No. 415?

A. No.

Q. Your records show no rental of any units in the northerly portion of that building?

A. No record of it, no.

Q. Now if we will refer to Exhibit I, the structure as it exists today, having reference to Exhibit

(Testimony of Charles Wemken.)

H. we find that the entrance to the structure is not only on the southerly wall, that is, the west extremity, but that we now enter into the eastern wall at the southern quarter and enter into a reception room which was non-existent at the time it was a duplex?

A. That is correct.

Q. And opening off the reception room is a closet which was non-existent at the time of this duplex?

A. That is right.

Q. Progressing from the reception room, we come into a living room, which was made up partially of the living room in the old structure?

A. Completely.

Q. Perhaps completely. As we progress easterly into the [128] dinette in the duplex we find that this is now a bedroom with closets that did not exist at the time the duplex was in existence?

A. All except the closet existed.

Q. That is the structure did, but at that time it was a dinette and it is now constituted as a bedroom?

A. That is right.

Q. And at the time it was a duplex that room was not a bedroom but it was a dinette?

A. That is right.

Q. Now as we take the next room to the north, we find it is a bedroom as it now exists and when it was a duplex that space occupied by what is now a bedroom was then a kitchen and dining nook?

A. That is right.

Q. What is now the bedroom was not a bedroom when it was a duplex. Let us take the bathroom off

(Testimony of Charles Wemken.)

the bedroom. That did not exist at the time the property was a duplex?

A. Not as a bathroom. It was still a portion of the house.

Q. It was a porch or something of that kind, perhaps even a patio. I am not sure whether that would be under room or not. Do you recall?

A. No.

Q. But at least it was a porch or patio or something of that kind under the duplex. Now the dining room in the present [129] structure immediately west of the bedroom we are mentioning was in the duplex a bedroom? A. That is correct.

Q. And now it is not a bedroom but it is a dining room. And the closet space that is off the dining room used to be the stairway to the basement, but it is now a closet? A. Yes.

Q. Now as we progress to the north through a hallway that did not exist in the duplex, we arrive today at what is a bedroom. That bedroom under the duplex was a living room, a bedroom where we used to have a living room. In the old duplex, as we went east from the living room we went into a breakfast nook. Today as we go east from the bedroom that used to be the living room we wind up in a kitchen. Now there has been a substantial alteration in the location of the kitchen. What was the breakfast nook is now the kitchen and these are the cupboards, been somewhat rearranged apparently. As you leave the kitchen you go into a hall and travel north, we go into two bedrooms. The bedrooms in the duplex are identical with the bedrooms in the present structure.

(Testimony of Charles Wemken.)

Those two bedrooms are in the portion of the duplex that was owner occupied, is that correct?

A. That is correct.

Q. Now the bath that is immediately to the south of these two bedrooms is exactly in the same position today as it was at [130] the time it was a duplex. That bath is in the portion of the building that was owner occupied at the time it was a duplex, is that right?

A. That is right.

Q. We progress through the hall from the bath further south and we enter a breakfast room. That, at the time this was a duplex, was a screened porch and that breakfast nook has been somewhat enlarged by the additional structure being created in the building as it exists today, is that correct?

A. That is correct, yes.

Q. Then in the building as it exists today we have one bedroom, two bedrooms, three bedrooms, four bedrooms, five bedrooms on the main floor and the only two of those bedrooms that were in existence as bedrooms at the time this was a duplex are the two bedrooms in the extreme northeast portion of the owner occupied part of the duplex?

A. That's right.

Q. In the basement there is an additional bedroom created where none existed before?

A. There is one now. I have no recollection.

Q. Today the entire unit is heated from a central heating plant, that is, piped heat to each room throughout the dwelling as it exists today. You have no recollection how it was heated before?

A. None whatever. [131]

(Testimony of Charles Wemken.)

Q. The construction of the south end of the building, constituting a reception hall and entrance closets and two closets off the bedroom and the addition on the east end, that is a part of the breakfast room and entrance way to the cellar stairs, involved the construction of new sides, etc., in order to make those structural changes? A. To some extent.

Mr. Wilson: I have no further question.

Redirect Examination

By Mr. Donohue:

Q. The bedrooms which were made were existing rooms that were still part of the existing structure, isn't that correct? A. That is correct.

Q. In the fixing of your rent, who was to supply the utilities for the accommodations here I might ask?

A. The tenant.

Q. The entire structure was rented to the tenant, was it furnished or unfurnished?

A. Furnished.

Q. But the tenant was to supply all utilities?

A. With the exception of water. I don't recall whether he was to pay for that or not.

Mr. Wilson: I have nothing further of this witness.

Mr. Donohue: That is all, Mr. Wemken. Plaintiff rests. [132]

MRS. DOROTHY WARD GINOCCHIO,

the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wilson:

Q. Will you please state your full name?

A. Dorothy Ward Ginocchio.

Q. You are the owner of certain premises that are involved in litigation in this matter in the City of Reno? A. I am.

Q. Those premises, in the year 1946, consisted of a duplex, 415 and 415½ East 8th Street?

A. Yes.

Q. And subsequent to the first of February, 1947, those premises were numbered what, 415½?

A. Yes.

Q. East 8th Street, Reno, Nevada?

A. Yes.

Q. I show you Defendant's Exhibit H, I, and J; first, with reference to Exhibit H, and ask you if that is a floor plan or a copy of the floor plan of the duplex as it existed in the year 1946? A. Yes.

Q. Was the original tracing, that is the original exhibit in evidence here, drawn by your father?

A. It was.

Q. Your father was a building contractor of Reno, Nevada? [133] A. Yes.

Q. And he is now deceased?

A. That is right.

Q. Was the building, as it existed in 1946, exactly as depicted upon the exhibit? A. Yes.

(Testimony of Mrs. Dorothy Ward Ginocchio.)

Q. In other words, there were two distinct dwelling units? A. Yes.

Q. The one in front was numbered 415, the one in the rear numbered 415½? A. Yes.

Q. The one in front was rented pursuant to registration reducing service, which are the government's Exhibit 4? A. Yes.

Q. Did any one other than yourself and family ever occupy the rear portion, which is 415½?

A. They did not.

Q. The only other person there was a small child that you took care of when her mother died?

A. Yes.

Q. And that wasn't a paying guest in the house?

A. No, sir.

Q. Now there is a wall along the southerly line of the living room, that is the northerly living room, that constituted a division between the two dwelling units? [134]

Q. Now, with reference to Defendant's Exhibit I, I ask you if that truly depicts the ground floor plan of the structure that is now known as 415½ East 8th Street in Reno, Nevada? A. Yes.

Q. Is that the structure that was leased to Mr. Weiser by lease dated August 20, 1947, and introduced in evidence here as Defendant's Exhibit K?

A. The date on that was August 1st, not the 20th that it was entered into. That is, it was entered into the 31st of July.

Q. I see. The term started on the first of August?

A. Yes.

Q. Of 1947? A. Yes.

(Testimony of Mrs. Dorothy Ward Ginocchio.)

The Court: Do I understand her answer to be that the lease covers the entire premises?

Q. The entire premises as depicted on Exhibit I which you hold in your hand? A. Yes.

Q. Now the separating wall between the dwelling units known as 415½ and 415 as it existed as a duplex was removed?

A. Yes, that complete wall, all the way back.

Q. You are indicating the southeast corner of what is now designated as a bedroom?

A. A bedroom; from there clear back to the wall that is beginning of this bathroom. That entire partition was removed [135] and an entire new structure built in there.

Q. And there was also additional floor space provided by the new structure to furnish a reception room and closet, to furnish closets for what may be designated as the south bedroom, to increase the size of the breakfast room, the entrance way to the cellar stairs and the bathroom that adjoins the cellar stairs, that was entire new construction, involving installation of new foundation? A. Yes.

Q. Involving the installation of new brick walls?

A. Yes.

Q. Involving the installation of new roofing?

A. Yes.

Q. And did that also involve the removal of the original foundation?

A. In some instances some of the original foundation had to be removed in order to properly tie in and make the construction uniform and the same. May I

(Testimony of Mrs. Dorothy Ward Ginocchio.)

add here there are 240 square feet of new building added to this, not taking in the back part.

Q. New floor space?

A. Two hundred forty square feet new floor space added to that.

Q. Now with reference to the building as it exists today, are the rooms as designated in this plan used for the purposes designated on this plan?

A. Yes. [136]

Q. In other words, as you come in, you come into a reception room? A. Yes.

Q. From there into the living room?

A. Yes.

Q. And going easterly into a bedroom?

A. Yes.

Q. And each room as we progress through the house is used for the purpose designated on the plan?

A. Yes.

Q. Now with reference to Defendant's Exhibit J, I call your attention to a bedroom in the northwest corner of the basement. Was that in existence at the time the structure was a duplex?

A. No, it was not. That was fixed for a furnace. This portion back here was all cut out.

Q. How was this structure heated as a duplex?

A. By two floor furnaces.

Q. One for each unit?

A. One for each unit.

Q. So that the floor furnace that was in the area that is now designated bedroom on Exhibit J heated the portion to the north that was owner occupied?

A. Yes.

(Testimony of Mrs. Dorothy Ward Ginocchio.)

Q. And where was the furnace that heated the renter occupied [137] portion?

A. On this wall, this room in here, the furnace area was in here.

Q. In other words, you are indicating the south-east corner of the bedroom that is immediately off the living room in the tenant occupied portion of Defendant's Exhibit H? A. Yes.

Q. And today how is the structure heated?

A. It is heated by a central furnace that is piped to each room.

Q. The old floor furnaces have been removed?

A. Yes.

Q. And each of the partitions that are marked in on Exhibit I "new partitions", they were non-existent at the time this was a duplex?

A. Yes.

Q. Those partitions that are not shaded are partitions that were in existence at the time it was a duplex? A. That is right.

Q. Now with reference to Exhibit J, do the shaded portions here also show new partitions and new work?

A. All of that is correct with the exception of a small portion right here up——

Q. "Up here", you are indicating a portion of the east wall that would be underneath what is now a bedroom and another bedroom on the east side of the building, the southeast corner [138] of the building?

A. From this point from where this place started over and up and all of this is all new construction.

(Testimony of Mrs. Dorothy Ward Ginocchio.)

Q. On the eastern portion there was a few feet shaded that actually were in the duplex?

A. Yes, this small portion in here, but the rest of that is all new foundation.

Q. And all new partitions in the basement where the shaded portions are?

A. Yes, this partition was put in on account of building the bath where a small open porch was before.

Q. I call your attention to page 1, Exhibit K, to the designation, the word "Guest House at 415 $\frac{1}{2}$ " with the $\frac{1}{2}$ exed out. A. Yes.

Q. Do you know how that "x" happened to get on there?

A. No, I do not. I do not think any of the other copies of the lease even have that "x" check on it. It was intended to remain 415 $\frac{1}{2}$ East 8th Street.

Q. Is that the number that the dwelling house bears at this time?

A. Yes, that is on there which all building permits were issued for and also a guest house license issued for 415 $\frac{1}{2}$.

Q. That has been the number on the building ever since the termination of the improvements as designated on the Exhibit I? A. Yes. [139]

Q. Actually this structure is situated to the rear of the land? A. That is right.

Q. And there is approximately what distance from East 8th Street back to the southerly wall of this building?

A. Offhand I would say roughly 75 feet.

Q. This building is located on the north side of

(Testimony of Mrs. Dorothy Ward Ginocchio.)

East 8th Street? A. Yes.

Q. And sets back approximately 75 feet from the street? A. Yes.

Mr. Wilson: You may question.

Cross-Examination

By Mr. Donohue:

Q. In any event, Mrs. Ginocchio, this lease was entered into for the entire premises, was it not, the lease just referred to?

A. Major Weiser and his wife leased the entire premises.

Q. Regardless of whether it was designated as 415 or 415½?

A. It was designated as 415½ and always intended to remain as 415½.

Q. In any event, it referred to this entire structure? A. The entire structure.

Q. Now when you refer to a new foundation, with the exceptions I think you pointed out there, you are referring, are you not, to replacement of an existing foundation, isn't that correct?

A. No, I am not. I am referring to the new foundation that [140] went in for the new additions that were added to that building.

Q. Can you tell me, Mrs. Ginocchio, the total floor space? A. Total floor space—

Q. Just a moment—before the conversion and after the conversion of the structure?

A. I could if you give me back those plans and let me measure.

Q. Offhand you can't?

(Testimony of Mrs. Dorothy Ward Ginocchio.)

A. The floor space I know and the additional—and the new additions, were 240 square feet—I would say there must be around 2,500 or more square feet floor space.

Q. So you added a total of 240 square feet space?

A. Of new building.

Q. How about the roof? Would you know the existing area of the original roof prior to the alteration?

A. No, because they go by squares on that and I know that the original roof going back this way and hip going back this way before they got through added another hip roof to the front and another hip roof to the side.

Q. Can you tell me what the overall increase in the roof according to the space was?

A. That I wouldn't even attempt to answer because not being well enough versed on those things to know how to answer intelligently, I wouldn't commit myself.

Mr. Donohue: That's all. [141]

Redirect Examination

By Mr. Wilson:

Q. I show you eight photographs, Mrs. Ginocchio, numbered 1 to 8 on the back, and ask you what those photographs depict?

Mr. Donohue: May I see them first?

A. This No. 1 refers to that addition we put on the east side.

Mr. Wilson: Let me show them to Mr. Donhue.

(Testimony of Mrs. Dorothy Ward Ginocchio.)
(Hands to counsel.) Do you have any objection to their being marked as Exhibit L as a unit?

Mr. Donohue: No, no objection.

(Short recess.)

3:20 P.M.

Mrs. Ginocchio resumes the witness stand on further

Redirect Examintion

By Mr. Wilson:

Q. By whom were these photographs, defendant's Exhibit L, taken, if you know?

A. By my youngest son.

Q. And his name?

A. Robert D. Ginocchio.

Q. Where is he at the present time?

A. He is stationed at Oakland.

Q. In the service? A. Yes.

Q. Military service? A. Yes.

Q. When were those pictures taken? [142]

A. Those pictures were taken during the time this reconversion was taking place on the premises.

Q. Approximately how long a period of time was occupied in changing of the duplex, as depicted in Exhibit 8, to the present structure as exhibited in Exhibit I?

A. Between four and five months.

Q. And briefly what do those pictures depict with reference to the number on the back of each?

A. No. 8 shows the foundation forms that were

(Testimony of Mrs. Dorothy Ward Ginocchio.)

put in across the front of the house for addition of the reception room and the addition to this present dinette in order to convert it into a bedroom and thereby add two closets to it.

Q. That is on the south wall of the building?

A. That is on the south wall of the building, yes.

Mr. Donohue: I would like to see if we can't fix the date a little more closely on that.

Mr. Wilson: All right, we will try.

A. Well, from the beginning of the time the construction started. We started construction along about the 15th of December, that is the interior construction of the house.

Mr. Donohue: Of what year?

A. That would be 1946 because the lease was entered into in 1947. This is in 1946 we started, about December 15, 1946, is when we started to tear out some of the interior partitions in the part of the duplex that we were then occupying and then [143] this exterior work started right after the first of January.

Q. How long was the period of construction, how long did it take?

A. From the time started I think every day.

Q. About how many months?

A. The actual construction was about five months and then we had finishing to do, such as painting and things like that, that were finished just before Mr. Weiser moved into the house the 31st of July, when he took possession of the premises. This picture here shows——

(Testimony of Mrs. Dorothy Ward Ginocchio.)

Mr. Wilson: What number?

A. No. 3 shows an east view looking north at the house before any construction started, with the exception of the forms being in there for the foundation and footings for this entire new addition that goes clear out here.

Q. That is along the easterly wall of the structure?

A. Easterly wall, looking north. This picture here, No. 6, looking at the east wall, shows the east porch that existed—it really wasn't a porch, more or less a patio—that was on the east side of the house where that addition was added there. And then we had a small roof that came out just a little so it covered this end into the basement, covered it over, and that part was screened over. This No. 7 shows the roof that was added to that portion designated as present breakfast nook and also a part of that construction there. No. 1 [144] shows construction of that wall that I showed you at first, shows this part of the house back here.

Q. That is along the east wall?

A. The east wall here, which is now this portion here, is No. 2, shows a portion of the new roof over the reception room and also shows the new chimney that was constructed on one side of the house for the new furnace. Then this picture here, No. 4, shows the front entrance as it then existed of the duplex and it shows the forms in place of the new foundation for this new reception room and this new front porch that was built.

Q. Was that entrance to 415 or 415½?

(Testimony of Mrs. Dorothy Ward Ginocchio.)

A. This was entrance to 415, and this No. 5 shows the front entrance after the front door had been removed and a window replaced in it and shows the new door entering from the west side of the house, but the original steps are still there, they hadn't yet put in the new steps and porch there.

Q. This was entrance to 415½ as it now exists, 415 as it used to be? A. Yes.

Q. And that also shows work tearing out and construction?

A. Oh, yes, before they finished the roof they tore out all this back structure and there had to be an entire new front put in there and had to be all rewired, the whole house.

Q. With reference to No. 4 there is a child depicted in the doorway. That is the child whose mother died and you took [145] care of until the father could find accommodations?

A. Until he remarried, yes.

Q. In the process of this conversion or conversion of the duplex to its present form, what happened to the plumbing fixtures?

A. All of them had to be removed and all new plumbing put in their place.

Q. In other words, the two baths that did exist were stripped of fixtures?

A. The one bathroom was completely stripped.

Q. Which one?

A. Out of the front unit. Took even the plaster off the walls and rearranged the fixtures, put in

(Testimony of Mrs. Dorothy Ward Ginocchio.)

entire new plumbing in there and all new bathroom fixtures and tiled the bathroom and, of course, new plaster and then the bath room that existed in the part that I occupied, that had to have some changes in plumbing there on account of the way they had put in the heat, necessitated changing some of the plumbing there also and then we had to have all new plumbing put in the kitchen of the front unit, that was all new plumbing and fixtures in there, so while they were working there in making the changes in the bathroom that they did, the plumber said it was almost necessary to put new plumbing in the kitchen, while we were having new drain and tile he thought we should have new plumbing, so he put all new plumbing in there. [146]

Q. New tile work and drain board?

A. All new tile work in the house, yes.

Recross-Examination

By Mr. Donohue:

Q. No. 7 here, that dark appears to be——

A. That is the new roof and that is the hip across the top, over the east construction of that room.

Q. What I want to know is, was there formerly some type of roof there where that roof is?

A. There used to be a small shade roof that went down just a few feet to cover that basement entrance there so the water wouldn't run down into it. It wasn't really what you call a roof, it was more or less a shade.

(Testimony of Mrs. Dorothy Ward Ginocchio.)

Q. But it covered the space which that roof covers?

A. No, it did not. Before the space had been about five feet, by oh, not more than seven feet wide and now it is 12 feet inside, finished; more than seven feet of roof space, an entire new roof.

Q. Figuring lineal floor space, I believe you said the roof originally extended five feet and this extended over seven more feet? A. Yes.

Q. But this was an angle roof rather than a flat shade?

A. Well, the shade was what you would call it, came down on an angle but that was torn out and this roof was built, as you can see, back into the hip this way. I imagine you would say [147] the roof extended approximately 18 feet long, all of 18 feet at the hip to the back.

Redirect Examination

By Mr. Wilson:

Q. Mrs. Ginocchio, in addition to the two thousand dollars that was received at the time of the execution of the lease, what sums of money have you received from the lessees in this matter?

A. In July of 1948 I received a check for \$90; on August 1st I received one for \$180, and September 1st \$180 and October \$180.

Q. That is the sum total?

A. The sum total of the checks.

Q. Is that all of the checks that you have received, including one check that you have written on the bank——

(Testimony of Mrs. Dorothy Ward Ginocchio.)

A. No, I have received a check you have in your possession and two others which have not been cleared through the bank.

Q. There is in my possession one check in addition to what you mentioned? A. Yes.

Q. Do you know the amount of this check?

A. Yes, \$180.

Q. And there is one written by Miss Hunter?

A. That is right.

Q. And there is a check that hasn't been cleared written by a Ruth Stewart in Utah? [148]

A. Correct.

Q. And the amount of that check?

A. \$180.

Q. What else?

A. A check I received on the First National Bank Branch of Reno by Mr. Weiser of \$180.

Q. That has been cashed? A. Yes.

Q. That makes six checks for \$180 received and one check for \$90 received, plus two thousand dollars received at the time of the execution of the lease agreement? A. Yes.

Recross-Examination

By Mr. Donohue:

Q. The \$90 check was paid by whom? Whose check was it?

A. I believe that it was one of Miss Hunter's checks. I am not sure, I can't remember because part I received from Mr. Weiser and some Miss Hunter and this check from Mrs. Stewart. I can't be sure whether that \$90 was Mr. Weiser or not.

(Testimony of Mrs. Dorothy Ward Ginocchio.)

It could be. Yes, I know, because the check bounced.

The Court: What check was that?

A. The \$90 check. He wrote "insufficient funds."

Q. Was it finally paid?

A. Finally, yes, about a month later.

Q. And the money received since July, 1948, to the present time has been either Mr. Weiser's check or check for or on [149] his behalf, is that correct?

A. By Miss Hunter and one by Mrs. Stewart.

Q. What happened during the period December, 1948, to July? Was the amount of the rent tendered to you?

A. At one time Mrs. Weiser and Mr. Weiser were involved in a divorce proceeding and Mrs. Weiser attempted to pay a half month's rent to me, which I refused. Then right after that, through Mr. Weiser's counsel, Miss Hunter, they attempted to make an agreement with me whereby I would cancel all rental owed from January and February plus all rental that they had received from their tenants up to the 15th of March and also give Mrs. Weiser \$500 and give Mr. Weiser \$1100. All told it would have amounted that we made refund to them of approximately, I would say, \$2300, and they would have the use of the house from August to the first of March, rent free, and we refused that offer.

Q. You have mentioned the court decree—they were having some difficulty. Do you know whether

(Testimony of Mrs. Dorothy Ward Ginocchio.)

or not under that decree these particular premises were not ordered by the court to be in the possession of Mrs. Weiser under this lease?

A. The only thing that I have to go by is what I was told. I saw no document, read no document from the court nor at any time was I informed of the procedure that the court was taking in regard to the disposition of this lease or anything relative to it. [150]

Q. And at various times, through your counsel, former counsel, Mr. Richards, wasn't the rent during the period January, 1948, to July, 1948, tendered, through your counsel, Mr. Richards, to you by Mrs. Weiser?

A. No, it was not. If it was, Mr. Richards didn't tell me so and Mr. Richards' integrity is such that it wouldn't be questioned.

Mr. Donohue: That is all.

Mr. Wilson: I have no further questions.

Mr. Donohue: Your Honor, with reference to that last matter, I have a witness in rebuttal.

CHARLOTTE HUNTER,

a witness for the plaintiff, was duly sworn and testified in rebuttal, as follows:

Direct Examination

By Mr. Donohue:

Q. Will you state your name, please?

A. Charlotte Hunter.

Q. Miss Hunter, under this decree I will call

(Testimony of Charlotte Hunter.)

your attention to this paragraph here and do you know what premises that has reference to?

A. The premises in question.

Q. The premises involved in this suit?

A. That is right.

Q. Will you just state briefly what—that is a court decree dissolving the marriage of Mr. Weiser and under that decree the leased premises which are involved in this suit were [151] awarded to Mrs. Weiser?

A. No, I wouldn't know. I didn't represent Mr. Weiser at that time.

Q. Do you know, and in your presence, was the rent tendered by Mrs. Weiser to Mr. Richards, who was counsel for Mrs. Ginocchio?

A. In my presence and in the presence of Mr. Richards, Mr. Lougaris, counsel for Mrs. Weiser, tendered two months' rent, as I recall.

Q. About when was that?

A. That was some time after the divorce. I can't tell you exactly what month. There was a conference held at these premises and three attorneys were present.

Q. And the rent was refused by Mrs. Ginocchio's counsel, is that correct?

A. The rent was refused, yes.

Q. And was there any reason stated?

A. I don't know that the reason was stated then but I think Mrs. Ginocchio at some time stated she was afraid she would jeopardize her position or

(Testimony of Charlotte Hunter.)

jeopardize herself later with the OPA asking for rental on the lease.

Q. But at least on one occasion when two months' rent was tendered you were present?

A. Yes.

Q. Do you recall the amount? [152]

A. In the amount of \$180.00 monthly rental.

Q. The total amount therefore was \$360?

A. That was my understanding.

Q. Did you have an explanation you wanted to make in connection with this?

A. This is very difficult. I did not expect to be called as a witness and I asked Leota Rainsford if she would check the minutes because that decision very clearly gives possession to Mrs. Weiser by Judge Maestratti and counsel decided what the distribution of the property should be, both counsel understand, there isn't any misunderstanding there, that Mrs. Weiser was given possession of the property for six months and she was taking on all obligations, should pay utilities and rental until these first six months expired, after which he would pay the rental.

Mr. Wilson: I can't help but object. If that be in the minutes of the court, it is perfectly simple matter to produce the minutes. We have the decree of court. I have no objection to its introduction, no objection to its form and introduction at all. I am quite willing to let it speak for itself, but for some one, who wasn't present in court and who has not examined the minutes, except talking to the court

(Testimony of Charlotte Hunter.)

reporter, to testify as to what took place, I must object.

The Court: Objection will be sustained. [153]

Mr. Donohue: This is offered in evidence. No objection by counsel.

The Court: Marked as plaintiff's Exhibit 7.

[Printer's Note: Plaintiff's Exhibit No. 7 is set out in full at page 122 of this printed Record.]

Cross-Examination

By Mr. Wilson:

Q. In what form was tender made by Mr. Lougaris on the occasion that you mention?

A. Frankly, I couldn't tell you. He had envelopes which contained either the money or checks. I wasn't very much concerned with that at that time.

Q. You don't know whether it was money or checks? A. No, I do not know.

Q. Do you know exactly what the amount was?

A. Other than what was spoken of \$180.

Q. Did you say the tender was for two months?

A. That was my understanding. Mr. Lougaris was representing Mrs. Weiser and I wasn't particularly concerned at that time.

Q. So after all you don't have a very independent recollection of what was tendered, the form and amount?

A. I have a recollection as to the amount from the conversation. The form I do not know.

Mr. Wilson: That is all.

(Testimony of Charlotte Hunter.)

Mr. Donohue: That's all, Miss Hunter.

The Court: Any further testimony?

Mr. Donohue: Plaintiff rests.

Mr. Wilson: Defendant rests. [154]

The Court: Now facts that appear in this testimony cause me to make a finding, and I am going to make a finding that on or after February 1, 1947, additional housing accommodations were created by conversion of these premises. If this is in the nature of review of the order refusing decontrol, the order will be that these premises are not subject to control under the statute. They are within the exemption set forth in Section 1892 of Title 50 Appendix to the United States Code Annotated. The prayer for permanent injunction is denied and the prayer for an order ordering the defendant to tender the sum of \$1100 is also denied, and it is ordered that these premises are decontrolled under the housing act of 1947. [155]

State of Nevada,

County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, do hereby certify: That I was present and took verbatim shorthand notes of the testimony adduced at the trial of case No. 675, wherein Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, is plaintiff, and Mrs. Dorothy Ward Ginocchio is defendant, held in Carson City, Nevada, on the 19th of January, 1949, and that the preceding pages, numbered 1 to 86, inclusive, comprise a true and cor-

rect transcript of my said shorthand notes, to the best of my knowledge and belief.

Dated at Carson City, Nevada, April 25, 1949.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed April 26, 1949. [156]

DEFENDANT'S EXHIBIT A

Office of Rent Control, O.H.E.
131 West Second Street
Reno, Nevada

Office of Price Administration

August 13, 1947

Mrs. Dorothy Ward Ginocchio
1668 Oak Glen
Reno, Nevada

Dear Mrs. Ginocchio:

After my telephone conversation with you this morning, I called Mr. William Goldbaum, one of our regional rent attorneys in San Francisco, regarding your case. He sustained my opinion that this property is not eligible for decontrol.

He also advised that the proper procedure to establish rental for the house as it now exists, is by a petition from you for an adjustment in rent. In this petition you must state exact figures of cost of the improvements, including furnishings, and substantiate your statement by receipted bills.

I am, therefore, dismissing our D-18 action, Docket

8-RE-18-822, and enclosing two forms of our D-1, Petition for an Adjustment in Rent.

Will you please complete these forms in detail, and return them to this office.

Very truly yours,

/s/ CHARLES WEMKEN,
Area Rent Director.

Encl.—CW/gs.

DEFENDANT'S EXHIBIT K

This Agreement of lease made and entered into this 30th day of July, A.D., 1947, by and between Dorothy Ward Ginocchio of the City of Reno, County of Washoe, State of Nevada, party of the first part, hereinafter referred to and designated as the Lessor, and Matthew S. Weiser and Helen A. Weiser, his wife, the parties of the second part, hereinafter referred to and designated as the Lessees:

Witnesseth:

That the said Lessor, for and in consideration of rents, covenants and agreements hereinafter mentioned, reserved and contained on the part and behalf of the said Lessors to be kept paid and performed, does by these presents demise and let unto the said Lessees, and the said Lessees do by these presents hire, rent and take from the said Lessor all of the following real property known as the Guest House at 415 East Eighth Street in the City of Reno, County of Washoe, State of Nevada, and the personal property thereto, more particularly described in Exhibit "A" and made a part hereto.

To Have and To Hold, the above described premises, together with the appurtenances, unto the said Lessees from the first day of August, A.D., 1947, for and during the full term of Two (2) Years thereafter, thence next ensuing and fully to be complete and ending, the Lessees yielding and paying therefore unto the said Lessor the monthly rental and the sum of Two Hundred and Fifty (\$250.00) Dollars in United States money in advance on the first day of each and every month of said term, rental of the first month (August 1, 1947, to August 31, 1947) and the last five months (from March 1, 1949, to July 31, 1949), a total of Fifteen Hundred (\$1,500.00) Dollars has been paid in advance by the Lessees and receipt of the same is hereby acknowledged by the Lessor. In addition to the rental above reserved, the Lessees agree to pay for all electric, water, fuel and other bills contracted in connection with the said leased premises and to hold the Lessor absolutely free from any and all liabilities in connection with the same.

It Is Specifically Understood by and between the parties hereto that the said premises are leased unto the Lessees for the sole purpose of conducting therein a Guest House (specializing in board and room), and the said Lessees hereby agree that they shall conduct such business herein mentioned in an orderly and peaceful manner, strictly within the city ordinances and state laws, and the said Lessees do hereby grant unto the said Lessor, her agents or attorneys, and to all officers of the law the right to enter and search the said premises, and every part thereof, with and without a warrant of search, for the purpose of

determining to their satisfaction that the said premises and all parts thereof are being strictly used in compliance with all conditions herein contained.

It Is Further Understood and agreed by and between the parties hereto that the said Lessees do hereby promise that they will, during the term of this lease, at their own cost and expense, keep and maintain the premises and the whole thereof, especially the plumbing up to the main line, in good condition and repair as the same is now or may hereafter be put into.

Provided Always, nevertheless, that if the rent above reserved, or any part thereof, shall be in arrear or unpaid on any day of payment whereon the same ought to be paid as aforesaid, or in default shall be made in any of the covenants herein contained on the part or behalf of the said Lessee to be paid, kept or performed, to declare them Tenants At Will, then and from thenceforth it shall and may be lawful for the said Lessor into and upon the said premises, and every part thereof, wholly to re-enter, and the same to have again, repossess, and enjoy as in her first and former estate, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. And the said Lessees do hereby covenant and agree to and with the said Lessor that the said Lessees shall and will monthly, and every month during the said term, well and truly pay, or cause to be paid, unto the said Lessor, the said rent, on the days and in the manner limited and prescribed as aforesaid for the payment thereof, without any deduction, fraud, or delay, according to the true intent and meaning of these presents; nor assign this lease, nor per-

mit any other persons to improve the demised premises, or make or suffer to be made any alteration therein but with the approbation of the Lessor's consent in writing having been first obtained; and that on the last day of said term, or other sooner determination of the estate hereby granted, the said Lessees shall and will, peaceably and quietly, leave, surrender, and yield up unto the said Lessor the said premises and the furniture thereto as described in Exhibit "A", in as good state and condition as the same are now or may be put into, reasonable use and wear thereof and damage by the elements excepted.

It Is Further Understood and agreed upon, that the Lessees shall save and hold harmless the Lessor from any and all claims of liability with death or injury to a person or persons, or damage to property occasioned by the negligence of the Lessees, or any of his or their employees, and occurring in and on, or about the premises while the Lessees are in actual possession of the premises.

It Is Further Understood and agreed upon by and between the parties hereto that no waiver by the Lessor at any time of any of the terms, covenants, conditions or agreements of this lease shall be deemed or taken as a waiver at any time thereafter of the same or any term, covenant or condition or agreement herein contained, nor of the strict and prompt performance thereof by the Lessees. It is further mutually understood, covenanted and agreed upon by and between the parties hereto, that in the event the building or premises shall during the term of this lease be so damaged or destroyed by fire, war,

or act of God (not due to the act and omission of the Lessees, their agents or employees, or any person or persons who may be in or upon said demised premises with the consent of the said Lessees) as to render said leased premises untenable for the ordinary uses of which it is put by said Lessees, then in that event said Lessees shall not be liable for rent until said building or premises are restored and made tenantable again; provided, however, that in the event the damage occasioned to said building by reason of such fire shall not be repaired and said premises not made tenantable for the former use of the Lessees within ninety (90) days from date of such fire, then this lease shall be terminated at the option of the Lessor or Lessees hereto, and nothing herein shall be construed as obligating the Lessor to rebuild or repair the said premises, but it is agreed that in the event said premises is again placed in a tenantable condition for the use of the Lessees within ninety (90) days from the date of any fire, that the Lessees are obligated to resume their possession and occupancy from the date that said premises are again tenantable and then under the terms and conditions of this lease.

In Witness Whereof, the said parties have hereunto set their hands, the day and year first above written.

/s DOROTHY WARD GINOCCHI,
Lessor.

/s/ MATTHEW S. WEISER,
Lessee.

/s/ HELEN A. WEISER,
Lessee.

PLAINTIFF'S EXHIBIT No. 1

Form D-27B.

United States of America
Office of the Housing Expediter
Office of Rent Control

Stamp of Issuing Office: Office of Rent Control,
O.H.E., 131 West Second Street, Reno, Nevada.

ORDER REJECTING DECONTROL RENT

Concerning (Address of Accommodations): 415½
East 8th St., Reno, Nevada. Apartment No.: House.
Docket No.: 8-RE-DC-33.

To: (Name and Address of Landlord): Joe B.
Ginocchio, 1668 Oak Glen, Reno, Nevada. To: (Name
and Address of Tenant): M. S. Weiser, 415½ E. 8th
St., Reno, Nevada.

After due consideration of Form D-94 (Report of
Decontrol) and all available evidence, the Rent Direc-
tor has determined that the above described unit or
units do not qualify for decontrol under Section
202(c) of the Housing and Rent Act of 1947, for the
reason checked [] below:

- [X] The unit is not a newly constructed dwelling
unit, the construction of which was completed
on or after February 1, 1947.
- [X] The unit is not a conversion completed on or
after February 1, 1947.
- [] The unit was not in existence on February 1,
1945.

[X] The unit was rented to other than a member of the immediate family of the occupant between February 1, 1945, and January 31, 1947.

* * * *

[In Pencil]: See my letter of Sept. 8, '47.

Date: September 9, 1947.

/s/ CHARLES WEMKEN,
Rent Director.

[Check]

First and Virginia Branch, No. 51
First National Bank of Nevada

Reno, Nevada, Sept. 23, 1947

Pay to the order of Dorothy Ginocchio.....\$250.00
Two Hundred Fifty 00/100.....Dollars

/s/ MATTHEW S. WEISER.

Rent Oct. 1 to 31, inc., premises 415½ E. 8th St.,
Reno.

(Reverse side): Dorothy Ginocchio. Deposit only.

[Check]

First and Virginia Branch, No. 23
First National Bank of Nevada

Reno, Nevada, Sept. 1, 1947

Pay to the order of Dorothy Ginocchio.....\$250.00
Two Hundred, Fifty and 00/100.....Dollars

/s/ MATTHEW S. WEISER,

Rent, Sept. 1—Oct. 1, '47. 415 E. 8th St.

(Reverse side): /s/ Dorothy Ginocchio.

[Check]

First and Virginia Branch, No. 10
First National Bank of Nevada

Reno, Nevada, July 31, 1947

Pay to the Order of R. Redelius.....\$1,000.00
One Thousand 00/100Dollars

/s/ MATTHEW S. WEISER.

To complete payment of \$1,500.00 advance 6 mos.
rent on 415 and 415½ E. 8th St.

(Reverse side): [Stamp] For deposit only. Pay to
the order of First & Virg. Branch 94-2, First National
Bank of Reno, R. Redelius.

[Check]

First National Bank of Nevada
First and Virginia Branch, No. 5

Reno, Nevada, July 19, 1947

Pay to the order of R. Redelius.....\$500.00
Five Hundred 00/100Dollars

/s/ MATTHEW S. WEISER.

Deposit on rent of 415½ E. 8th St., to be used as
guest house.

(Reverse side): [Stamp] For deposit only: Pay
to the order of First & Virg. Branch 94-2, First
National Bank in Reno. R. Redelius.

PLAINTIFF'S EXHIBIT No. 2

Form D-35. (Corrected Copy.)

United States of America
Office of the Housing Expediter

Stamp of Issuing Office: Office of Rent Control,
O.H.E., 131 West Second Street, Reno, Nevada.

ORDER ADJUSTING MAXIMUM RENT

Concerning (Address of Accommodations): 415
East 8th St., Reno, Nevada. Docket No.: 8-Re-1974.

To: (Name and Address of Landlord): Mrs. Dorothy
Ginocchio, 1668 Oak Glen Dr., Reno, Nevada.

The Rent Director, after consideration of all the
evidence in this matter, has determined that the
maximum rent for the above-described accommoda-
tions should be adjusted on the grounds stated in
Section(s) 5(a)(1), 5(a)(3) of the Rent Regulations.

Therefore, it is ordered that the maximum rent for
the above-described housing accommodations be, and
it hereby is, changed from \$55.00 per month to \$180.00
per month.

This order issued December 12, 1947, and is effec-
tive on the date checked below:

From August 1, 1947.

This order will remain in effect until changed by
the Office of the Housing Expediter.

/s/ C. W.,
Rent Director.

To: (Name and Address of Tenant): Mrs. M. S.
Weiser, 415 East 8th St., Reno, Nevada. M. S. Weiser,
LaSalle Hotel, Reno, Nevada.

PLAINTIFF'S EXHIBIT No. 3

[Chas. L. Richards Letterhead]

September 17, 1947

Mr. Charles Wemken, Area Rent Director,
131 West Second Street, Reno, Nevada.

Dear Mr. Wemken:

In Re: Your Docket No. 8-RE-DC-33

This will acknowledge your letter of September 9, 1947, wherein you stated that you had issued to Mr. and Mrs. Ginocchio a final order rejecting decontrol of these accommodations. It is my desire to file further objections to your Ruling but I would rather delay taking the matter up with the Regional Office at San Francisco, Calif., until I have first had the privilege of presenting the facts as we see them to the Board of Control that has been appointed by Governor Pittman, covering this area. I know the appointments have been made but have been unable to ascertain when the organization of that Board will be completed and ready for action.

I shall appreciate definite information on this point from you if you can give it to me. I understand such a Board shall act only in an "advisory" capacity, but I would like to take advantage of the privilege of presenting the matter to them for their determination.

Awaiting any further words from you, I remain
Very sincerely yours,

/s/ CHAS. L. RICHARDS.

CLR:p

PLAINTIFF'S EXHIBIT No. 5

OPA Form: D-35.

United States of America
Office of Price AdministrationStamp of Issuing Office: Reno Defense Rental
Area Office, 285 South Virginia St., Reno, Nevada.

ORDER ADJUSTING MAXIMUM RENT

Concerning (address of accommodations): 415 E.
8th Street, Reno, Nevada.

Docket No. 8-RE-10-69.

To: (Name and Address of Landlord): Dorothy
Ginocchio, 415½ E. 8th Street, Reno, Nevada. (Name
and Address of Tenant): Max Carter, 415 E. 8th
Street, Reno, Nevada.

The Rent Director, after consideration of all the evidence in this matter, has determined that the Maximum Rent for the above described accommodations should be adjusted on the grounds stated in Section(s) 5(c)(1) of the Rent Regulation.

Therefore, it is ordered that the Maximum Rent for the above described housing accommodations be, and it hereby is, changed from \$57.50 per month to \$55.50 per month, for lack of use of electric refrigerator.

Issued Nov. 8, 1946, and effective as per next rental period. This order is now in effect and will remain in effect until changed by the Office of Price Administration.

/s/ C. W.,
Rent Director.

PLAINTIFF'S EXHIBIT No. 6

Office of Rent Control, O.H.E.

131 West Second Street

Reno, Nevada

November 25, 1947

Mr. and Mrs. Joe Ginocchio

1668 Oak Glen

Reno, Nevada

Dear Mr. and Mrs. Ginocchio:

Re: Decontrol premises formerly 415 and 415½
East 8th St., Reno, now being 415 East 8th
St.

The recommendation, which the Area Rent Advisory Board has formulated regarding the above captioned case, after careful consideration of all the facts, and the regulations relating to rent control, is as follows:

Owing to the nature and type of alterations, and since only 240 sq. ft. of floor space have been added, and no contribution made for the provision of additional families; and in view of the many vacancies now existing for single rooms; and in consideration of the primary intent of the law governing controls of rentals, the property must remain under its original controlled status.

We regret that there is no other alternative in view of the expenditure in money to recompense the building's interior.

Our Board feels that you are entitled to apply to

the Area Rent Control Office for an adjustment of rent, however.

We are also mindful of the fact that the controls will expire by law next February 29, 1948, therefore, a reasonable adjustment of rental in the interim will cause no undue hardship.

Yours very truly,

AREA RENT ADVISORY BOARD,
By /s/ RUSSELL MILLS,
Chairman.

RM/gS Cc: Mr. Charles Richards.

PLAINTIFF'S EXHIBIT No. 7

In the Second Judicial District Court of the State of
Nevada, in and for the County of Washoe

No. 114334

MATTHEW W. WEISER,

Plaintiff,

vs.

HELEN ANTHONY WEISER,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECREE

This Cause came on regularly to be heard on January, 15, 1948. The plaintiff appeared in person and by his attorney, Howard E. Browne, Esq., and the defendant appeared personally and by her attorney, I. A. Lougaris, Esq. Evidence was presented in support of the pleadings and the court, after hearing the

testimony and considering the same and all of the files in this action, finds that all of the allegations contained in the defendant's cross complaint are true.

As Conclusions of Law the court finds that the defendant is entitled to an absolute and final decree of divorce from the plaintiff upon the ground of extreme cruelty, and the relief hereinafter granted.

It Is Therefore hereby ordered, Adjudged and Decreed that the defendant be, and she hereby is, granted a decree of divorce from the plaintiff, final and absolute in form, force and effect, the laws of the State of Nevada providing no interlocutory period, or conditions or restrictions on remarriage; and that the bonds of matrimony now and heretofore existing between the plaintiff, Matthew S. Weiser, and the defendant, Helen Anthony Weiser, be, and the same are, hereby dissolved, and the parties freed from the obligations thereof and restored to the status of unmarried persons.

It Is Further Ordered, Adjudged and Decreed that the defendant have the exclusive care, custody, control and education of the said minor child of the parties hereto, namely, Helen Barbara Weiser, born January 27, 1946, until the further order of the Court, with the plaintiff's right of visitation at all reasonable times and places.

It Is Further Ordered, Adjudged and Decreed that the defendant have possession of the property under lease for six months from this date, to-wit; January 16, 1948.

It Is Further Ordered, Adjudged and Decreed that the defendant have use of all furniture and fixtures in the premises during said period; at the end of

six months defendant to surrender premises to plaintiff together with all furniture and all utensils except the following list:

- 1 dozen sheets
- 1/2 dozen pillow cases
- 1 dozen towels
- 4 blankets
- 1 kitchen stool
- 1 bedspread
- 1 sewing machine
- 1 dressmaking dummy
- 1 baby crib
- 1 baby high-chair
- 1 breakfast room set
- 1 child's swing

That at the time of surrender of premises plaintiff shall deliver his promissory note to the defendant for One Hundred Dollars (\$100.00) and same is to be made payable within six months.

It Is Further Ordered, Adjudged and Decreed that the plaintiff is to pay the sum of Fifty Dollars (\$50.00) per month for the support of the minor child, namely Helen Barbara Weiser, until the further order of the Court.

It Is Further Ordered, Adjudged and Decreed that the plaintiff is to pay the sum of Fifty Dollars (\$50.00) per month for the support of the defendant for a period of six months, effective this date, January 16, 1948.

Dated this 16th day of January, 1948.

/s/ A. J. MAESTRETTI,
District Judge.

State of Nevada,
County of Washoe—ss.

I, E. H. Beemer, County Clerk and ex-officio Clerk of the Second Judicial District Court of the State of Nevada, in and for Washoe County, said court being a court of record, having a common law jurisdiction, and a clerk and a seal, do hereby certify that the foregoing is a full, true and correct copy of the original, Findings of Fact, Conclusions of Law and Decree in Case No. 114334, Matthew W. Weiser, plaintiff, vs. Helen Anthony Weiser, defendant, which now remains on file and of record in my office at Reno, in said County.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at Reno, this 19th day of January, A. D. 1948.

(Seal) E. H. BEEMER,
Clerk.

By /s/ M. DOWD,
Deputy.

[Endorsed]: Filed January 19, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,

District of Nevada—ss:

I, Amos P. Dickey, Clerk of the United States District Court for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of said United States District Court of the District of Nevada, including the records, papers and files in the case of Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Plaintiff, vs. Mrs. Dorothy Ward Ginocchio, Defendant, said case being No. 675 on the civil docket of said Court.

I further certify that the attached record on appeal consisting of 159 pages numbered from 1½ to 158, inclusive, contains all of the original papers filed in this office in the above-entitled cause and also contains a certified copy of Civil Docket entry of January 20, 1949, which constitutes the entry of the Judgment.

I further certify that an Index is attached to this record on appeal identifying the papers herein.

Witness my hand and the seal of said United States District Court this 26th day of April, 1949.

(Seal)

AMOS P. DICKEY,

Clerk, U. S. District Court. [158]

[Endorsed]: No. 12234. United States Court of Appeals for the Ninth Circuit. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellant, vs. Mrs. Dorothy Ward Ginocchio, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed April 27, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12234

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellant,

vs.

MRS. DOROTHY WARD GINOCCHIO,

Appellee.

DOCUMENT ADOPTING STATEMENT OF
POINTS

To: Clerk of the Court of Appeals for the Ninth
Circuit.

Sir: Pursuant to subdivision 6 of Rule 19 of the
Rules of the United States Court of Appeals for the
Ninth Circuit, Tighe E. Woods, Housing Expediter,

appellant herein, adopts as his points on appeal, the statement of points previously filed in the District Court, and appearing in the transcript of record.

Respectfully submitted,

ED DUPREE,

General Counsel,

/s/ HUGO V. PRUCHA,

Assistant General Counsel,

/s/ NATHAN SIEGEL,

Special Litigation Attorney,

Office of the Housing Expediter, Office of the General Counsel, 4th and Adams Drive, S. W., Washington 25, D. C.

(Proof of Service attached.)

[Endorsed]: Filed May 11, 1949. Paul P. O'Brien, Clerk.

No. 12234

**In the United States Court of Appeals
for the Ninth Circuit**

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

MRS. DOROTHY WARD GINOCCHIO, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEVADA**

APPELLANT'S BRIEF

ED DUPREE,

General Counsel,

HUGO V. PRUCHA,

Assistant General Counsel,

CECIL H. LICHLITER,

Special Litigation Attorney,

Office of the Housing Expediter, Washington 25, D. C.

FILED

JUL 30 1948

PAUL P. O'BRIEN,

CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 12234

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT

v.

MRS. DOROTHY WARD GINOCCHIO, APPELLEE

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

This is an appeal by the Housing Expediter from the final judgment of the United States District Court for the District of Nevada, which denied injunctive relief and restitution by the defendant-landlord to a tenant of alleged rental overcharges in an action brought by the Housing Expediter, as plaintiff, to enforce compliance with the Housing and Rent Act of 1947, as amended,¹ (50 U. S. C. App. Secs. 1881 et. seq.), and the Controlled Housing Rent Regulation issued pursuant thereto (12 F. R. 4331).² Jurisdiction of the District Court was invoked by Section 206 (b) of the Act (50 U. S. C. App., Sec. 1896 (b)).

¹ Hereinafter referred to as the "Act" or the "Act of 1947."

² Hereinafter referred to as the "Regulation" or the "1947 Regulation."

Findings of fact, conclusions of law, and final decree were entered February 10, 1949 (R. 20-22). On March 30, 1949, plaintiff filed notice of appeal (R. 23), and an amended notice on April 8, 1949, the District Court on that same date having entered an order extending the time for appeal (R. 26, 27). Jurisdiction of this Court is invoked under Section 1291 of the Judicial Code (28 U. S. C. 1291).

STATEMENT OF THE CASE

This appeal raises the substantial questions (1) whether the Court below erred in permitting the defendant to contest upon trial findings of fact in the order of an Area Rent Director holding that the housing accommodations here involved did not qualify for decontrol under Section 202 (c) of the Act (*infra*, p. 52), in the absence of defendant's having first exhausted the administrative remedies provided by the Act and Procedural Regulation issued thereunder for review of such order; and (2) whether the Court erred in holding as a conclusion of law that upon the facts of this case, the housing accommodations leased to the tenants herein are additional housing accommodations created subsequent to February 1, 1947. (R. 22.)

Rulings by the trial Court in denying an injunction to restrain the defendant from demanding or receiving for occupancy of the housing accommodations any amounts in excess of the maximum rent established by the Act and Regulation, and in refusing to award restitution to the tenant of rentals admittedly received by the defendant (R. 3, 9), in excess of the

established maximum, stem essentially from the basic determinations by the Court below as stated (R. 22).

STATUTES AND REGULATIONS INVOLVED

By Section 202 (b) of the Act the term "housing accommodations" is defined to mean any "building, structure or part thereof, * * * rented or offered for rent for living or dwelling purposes * * * together with all privileges, services, furnishings, furniture and facilities connected with the use or occupancy of such property" (*infra*, p. 52). Section 202 (c) of the Act defines the term "controlled housing accommodations" as housing accommodations in any defense-rental area except that it does not include, among other excepted structures:

(3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947; * * * (*infra*, p. 52).

By Section 1 (b) (8) (i) of the Regulation (*infra*, p. 54), there are exempted from control with other exceptions, housing accommodations of the same character as described in Section 202 (c) (3) (A) of the Act above, with the proviso, however,

That all housing accommodations referred to in this paragraph (8) shall be subject to this regulation unless the landlord files in the area rent office a report of decontrol on a form provided by the Expediter within 30 days after July 1, 1947, or within 30 days after the date of first renting, whichever is the later: and *Provided further*, That if a landlord fails to file

said report of decontrol within the applicable specified period, such housing accommodations shall be and remain subject to the provisions of this regulation until the date on which he files said report (*infra*, p. 54).

By the same Section 1 (b) (8) of the Regulation it is further provided:

For the purposes of this paragraph (8) the word "conversion" means (1) a change in a structure from a nonhousing use or (2) a structural change in a residential unit or units involving substantial alterations or remodeling *and resulting in the creation of additional housing accommodations.* [Italics supplied.]

Rent Procedural Regulation 1 (12 F. R. 5916)³ implements the foregoing sections of the Act and the Rent Regulation. Sections 840.17 through 840.22 thereof provide for appropriate administrative proceedings in the filing by a landlord of *Reports of and Applications for Decontrol*, including entry by the Area Rent Director of an order rejecting such report or application after investigation; Sections 840.23 through 840.24 prescribe the procedure for *Landlord's Application for Review of Rent Director's Action* by the Regional Administrator for the region in which the defense-area office is located; *Subpart B* of the Regulation, Sections 840.25 to 840.45 both inclusive, states the procedure for *Appeals to the Housing Expediter*, in Washington, D. C., for review of an order entered by the Regional Administrator under Sections 840.23-

³ The pertinent sections of this Regulation including the procedure for appeals there provided are set forth in full in the Appendix (*infra*, p. 55).

840.24, together with the direct review of certain other orders of the Rent Director.

THE FACTS

There is no dispute as to the material facts which may be in substance stated: The housing accommodations involved consist of a single family dwelling of the present numbering 415½ East 8th Street, in Reno, Nevada, owned by the defendant (R. 21, 88). The house was originally constructed for such type of occupancy (R. 79). Prior to the year 1943, the building was altered to create two separate living units as a duplex, of the street numbers 415 and 415½ (R. 76, 79, 89). Between the years 1943 to 1946 the defendant and her family occupied the "rear" unit numbered 415½ (R. 76, 88). During the same period the "front" unit, of the number 415, was rented to a tenant (R. 76, 89). On January 15, 1943, the unit then rented was registered with the Area Rent Office of the Reno Defense-Rental Area as a controlled housing accommodation at the maximum rent of \$45.00 per month unfurnished (R. 77). Such registration was under the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. Secs. 901 et seq.),⁴ and the Rent Regulation for Housing issued thereunder (10 F. R. 13528).⁵ Subsequently the unit was furnished and reregistered at a maximum monthly rental of \$57.50 (R. 76-77). On November 8, 1946, upon a decrease of services to the tenant then in occupancy, the maximum rent

⁴ Hereinafter referred to as the "1942 Act" or "Act of 1942."

⁵ Hereinafter referred to as the "1942 Regulation."

was decreased by order of the Rent Director to \$55.50 per month (R. 120).⁶ The duplex unit occupied by the defendant and her family was at no time registered as a controlled housing accommodation (R. 83). About December 15, 1946, certain alterations of the duplex structure were commenced and continued until completion about five months later, and subsequent to February 1, 1947 (R. 78, 97). The "net result" of such alterations was that prior to the structural changes "there were two separate and distinct dwelling units," and after the work had been completed "there was one dwelling unit" (R. 79). The single dwelling after such changes was known as 415½ East 8th Street (R. 89), and bears such street number today (R. 93).

The 1942 Act expired June 30, 1947. The effective date of the Housing and Rent Act of 1947 and the Controlled Housing Rent Regulation issued thereunder was July 1, 1947. Section 204 (b) of the Act of 1947 provides substantially that from the effective date thereof no person should demand or receive any rent for the use or occupancy of controlled housing accommodations greater than the maximum rent established under the Act of 1942, and in effect

⁶ Such order was entered pursuant to Section 5 (c) of the 1942 Regulation which in part provides (10 F. R. p. 13532): "(c) *Grounds for decrease of maximum rent.* The Administrator at any time on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable only on the grounds that; * * *

"(3) *Decrease in services, furniture, furnishings or equipment.* There has been a decrease in the minimum services, furniture, furnishings or equipment required by Section 3 since the date or order determining the maximum rent."

on June 30, 1947 (*infra*, p. 52). On such date the only lawful rent with respect to any part of the remodeled dwelling was the monthly rental of \$55.50, as established by the order of the Area Rent Director, for the one unit of the street numbering 415, when the structure was in the form of a duplex (R. 77, 83, 89, 120).⁷

On July 30, 1947, by instrument in writing of the same date, the defendant leased the entire house, together with certain furniture therein, to the tenants, Matthew S. Weiser and his wife for a period of two years from August 1, 1947. The monthly rental therein provided was \$250.00 per month (R. 89, 94, Defendant's Exhibit "K," R. 110). Such lease was executed before the defendant had filed the report of decontrol as required by Section 1 (b) (8) of the Rent Regulation (*supra*, p. 3), (R. 78). The lease recited that rental for the first month of August, 1947, and for the last five months from March 1, 1949, to July 31, 1949, in the total amount of \$1,500.00 had been paid in advance, the receipt of which was acknowledged by the defendant (R. 111). On July 30, 1947, when the lease was executed the only registered maximum rent covering any part of the dwelling was the rental of \$55.50 per month for the former single unit of the duplex (R. 77).

⁷ Section 4 (a) of the 1947 Regulation provides in effect that the maximum rent of any housing accommodation shall be the maximum rent which was in effect on June 30, 1947, as established under the 1942 Act and the 1942 Regulation (*infra*, p. 55).

On August 13, 1947, there was a telephone conversation between the Area Rent Director, Charles Wemken, and the defendant (R. 72, 109). The details of such conversation are not disclosed by the record but thereafter, and on the same date, Mr. Wemken advised the defendant by letter of having discussed "your case" by phone with a regional rent attorney of the Housing Expediter's office in San Francisco, who had sustained the Director's opinion that the altered single dwelling unit "is not eligible for decontrol" (R. 109). The letter further advised of the regional attorney's view that the proper procedure to establish rental "for the house as it now exists" was a petition "for an adjustment in rent."⁸ Procedure in this respect was explained and forms of petition for such adjustment were enclosed (R. 109-110). The defendant, however, made no such application (R. 77).

⁸ Section 5 (a) of the 1947 Regulation provides among other *Grounds for increase of maximum rent* upon the filing by a landlord of a petition for adjustment (12 F. R. p. 4334): "(1) *Major capital improvement after effective date.* There has been on or after the effective date of the Rent Regulation for Housing, issued pursuant to the Emergency Price Control Act of 1942, as amended, a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement, and maintenance or a substantial increase in the services, furniture, furnishings, or equipment, and the rent on the maximum rent date was fixed by a lease or other rental agreement which was in force at the time of such change or increase. * * *

"(3) *Substantial increase in space, services, furniture, furnishing or equipment.* There has been a substantial increase in the services, furniture, furnishings, or equipment provided with the housing accommodations since the date or order determining its maximum rent or a substantial increase in the living space since June 30, 1947. * * *

After the middle of August, 1947, defendant filed with the Area Office of the Reno Defense-Rental Area the form provided by Section 1 (b) (8) of the Rent Regulation (*supra*, p. 3), for decontrol of the leased dwelling (R. 78). After making an investigation of the housing accommodations (R. 78), as provided by Section 840.18 of Rent Procedural Regulation 1 the Rent Director on September 9, 1947, issued an order (R. 12, 115), as provided by Section 840.19 of the same Regulation (*infra*, p. 56). Such order rejected decontrol of the housing accommodations upon the ground, among others, that the unit as altered from the former duplex "is not a conversion completed on or after February 1, 1947" (R. 115-116).⁹ Upon receipt of such order the defendant made no request for reconsideration thereof by the Director as provided by Section 840.20 of the Procedural Regulation. At the same time the defendant filed no application for review by the Regional Administrator as provided in the same section and in Section 840.23 (*infra*, p. 57).

By letter of September 17, 1947 (R. 119), to the Area Director, defendant's attorney, Charles L. Richards, advised of his desire to file "further objections" to the Director's order, but "would rather delay taking the matter up with the Regional Office at San Francisco, Calif.," until he had first had an opportunity of presenting "the facts as we see them"

⁹ This order was based upon a "physical inspection of the premises" by the Rent Director after receipt of the application for decontrol (R. 78).

to the rent advisory board provided¹⁰ by Section 204 (e) (1) of the 1947 Act (*infra*, p. 53). The same letter stated the attorney's understanding that "such a Board shall act only in an 'advisory' capacity," but that he desired to have the privilege of presenting the matter for "their determination" (R. 119). Correspondence between the Rent Director and defendant's attorney followed, Mr. Richards being advised of the board's organization not being completed when his letter of September 17th was received, but being finally accomplished on October 27, 1947, with advice also of subsequent meetings (R. 42, 43, 44). After consideration of the facts, the rent advisory board by letter of November 25, 1947, addressed to the defendant and her husband, advised of its "recommendation" as follows (R. 121):

Owing to the nature and type of alterations and since only 240 sq. ft. of floor space have been added, and no contribution made for the provision of additional families; and in view of the many vacancies now existing for single rooms; and in consideration of the primary intent of the law governing controls of rentals, the property must remain under its original controlled status.

The same letter also states that "Our Board feels that you are entitled to apply to the Area Rent Control Office for an adjustment of rent * * *" (R. 121-122). The defendant having made no appli-

¹⁰ While the letter referred to "the Board of Control that has been appointed by Governor Pittman, covering this area," it is obvious from further proceedings that reference to the rent advisory board provided by the Act was intended.

cation for a rent adjustment, the Area Director on December 12, 1947, pursuant to Section 5 (a) of the 1947 Regulation, issued an order adjusting the maximum rent of the housing accommodations, effective from August 1, 1947 (R. 118). It was from such date that defendant had leased the altered single unit at a rental of \$250.00 per month (R. 111). By such order, the maximum rent of \$55.50 per month covering the one former duplex unit (R. 120), was changed to \$180.00 per month for the dwelling unit existing after the alterations (R. 118).¹¹

The first communication of defendant's attorney, Mr. Richards, with the Regional Administrator, Ward Cox, in San Francisco, was by letter dated December 20, 1947 (R. 44, 73). Such letter was written at the request of the defendant following her phone conversation with Mr. Cox, the date of which does not appear, but in which conversation Mr. Richards' letter recites that the Regional Director had requested a copy of "my Complaint together with 'points' and 'citations' presented to the Office of Rent Control in Reno" (R. 45). The same letter enclosed "copy requested" (R. 45).

On January 2, 1948, the Regional Administrator replied to Mr. Richards' communication (R. 39-40). In such response Mr. Cox noted that the "complaint" enclosed "was addressed to the Reno Rent Advisory Board," and did not state sufficient facts to determine

¹¹ Such increase was based upon the grounds stated in Section 5 (a) (1) and Section 5 (a) (3) of the Regulation by reason of a major capital improvement of the housing accommodations and a substantial increase in space, services, furniture, or equipment provided (*supra*, p. 8).

whether the action of the Area Rent Office was correct; that the Administrator was writing the Area Office for a report and as soon as a reply was received defendant's attorney would be advised further (R. 40). The same letter advised of the procedure prescribed in Rent Procedural Regulation 1 (*infra*, p. 55), for review of the decision of the Rent Director, a copy of this Regulation being attached. Attention was particularly invited to Section 840.23 providing for filing of application for review by the Regional Administrator, and of Section 840.25 setting forth the procedure for filing an appeal with the Office of the Housing Expediter in Washington, D. C. (R. 40). In response to such letter no further proceeding was filed by the defendant with the Regional Administrator and no appeal was filed with the Washington Office of the Housing Expediter (R. 40). On February 10, 1948, Mr. Cox advised Mr. Richards in further reference to his earlier letter of January 2, 1948, and stated that upon investigation it was found that the proceedings in the Area Rent Office were handled in accordance with the Rent Regulations and interpretation thereof by the Regional Rent Attorney; also, that as a suit had been filed, "decision in this case rests with the court" (R. 44).

PROCEEDINGS IN THE COURT BELOW

The complaint filed by the Housing Expediter January 24, 1948 (R. 2) under Section 206 (b) of the 1947 Act (*infra*, p. 53), alleged that the housing accommodations consisting of the altered dwelling were at all times since July 1, 1947, subject to the Act

and Rent Regulation issued thereunder (R. 2); that on December 12, 1947, the Rent Director for the Defense-Rental Area wherein the accommodations are situated had issued the order reducing the maximum rent effective from August 1, 1947, and directing the defendant to refund within thirty days after issuance any rent received in excess of the lawful maximum as thus fixed; that the amount of rent demanded and received by defendant between August 1, 1947, and December 12, 1947, in excess of the maximum as fixed by such order was \$1,100.00; that the defendant had violated the Regulation by failing and refusing to refund to the tenant any part of such amount as the order required (R. 3).

The complaint prayed a temporary injunction enjoining the defendant from demanding or receiving rents in excess of the lawful maximum, and that an order issue directing refund to the tenant, Weiser, the sum of \$1,100.00 in excess of the lawful rental established (R. 3-4). Schedule attached to the complaint as Exhibit "A", showed rent collected of \$250.00 per month over and above the legal maximum of \$180.00 per month for five months from August 1, 1947, to December 31, 1947, resulting in an overcharge to the tenant of \$70.00 per month, or a total of \$350.00 (R. 4). The same schedule set forth that defendant also received and retained the sum of \$750.00 from the tenant as a bonus, security deposit or prepayment of rent in violation of the Rent Regulations, making the total amount refundable to the tenant \$1,100.00 (R. 4).

The answer of defendant admitted entry of the reduction order requiring refund of rent as the complaint alleged, the receipt of the sum of \$1,100.00 as stated in the complaint and the refusal to refund the same (R. 9). Defendant alleged that her refusal to make such refund was due to the fact that she believed "the Rent Expediter of the Reno rent area" had exceeded his authority under the 1947 Act in making such order, upon the claim of defendant that the housing accommodations were decontrolled and beyond the jurisdiction of the Expediter (R. 9).

In response to plaintiff's request for admission (R. 10), defendant admitted that during the period from August 1, 1947, to December 31, 1947, the maximum rent for the accommodations formerly described as the duplex units of the numbering 415 and 415½ East Eighth Street in Reno, was \$180.00 per month as fixed by the order of the Rent Director effective from August 1, 1947 (R. 11); also, that over the stated period defendant had received rent for August, September and October at \$250.00 per month, carrying the excessive amount of \$70.00 per month or a total of \$210.00 over the three-months' period (R. 15). Order upon pretrial conference (R. 17-18) recites the defendant's admission of receipt of \$750.00 from August 1, 1947, to December 31, 1947, and the receipt also of the sum of \$1,100.00 between August 1, and December 12, 1947, in excess of the lawful maximum rent. Four checks of various dates between July 19, and September 23, 1947, all signed by the tenant, Matthew S. Weiser, and totaling \$2,000.00 were received in evidence as plaintiff's Exhibit 1, at

the Pretrial Conference (R. 18, 116). Upon trial, the receipt by defendant of \$2,000.00 in rental payments was admitted (R. 33).

At the conclusion of trial on January 19, 1949, the Court below held that the defendant had not failed to "follow the administrative procedures" (R. 70), in seeking review of the order of the Rent Director (R. 12, 115), rejecting decontrol of the housing accommodations. The trial Court further held (R. 108), after considering the nature of the alterations whereby the duplex units were converted into a single dwelling, that after February 1, 1947, additional housing accommodations were created by conversion of the premises, and the relief prayed for permanent injunction and refund to the tenant of the sum of \$1,100.00 was denied (R. 108). On January 20, 1949, judgment was entered in accordance with such findings (R. 19). By conclusions of law and decree entered February 10, 1949, it was adjudged that the dwelling unit in question was not at any time subsequent to August 1, 1947, controlled housing accommodations under the Act of 1947; that plaintiff's application for a permanent injunction be denied, together with the application for an order requiring restitution to the tenant of the amount of \$1,100.00 (R. 22, 23). From such judgment and decree the present appeal has been taken (R. 27).

SPECIFICATIONS OF ERROR

1. The Court below erred in permitting the defendant to contest at trial findings of fact in the order of the Area Rent Director that the housing accommodations did not qualify for decontrol, in the absence

of defendant having first exhausted the administrative remedies provided by the Act and Procedural Regulation for review of such order.

2. The Court below erred in holding as a conclusion of law that the defendant did not fail to pursue the administrative remedies available to her prior to commencement of this action.

3. The Court below erred in holding as a conclusion of law and in the final decree, that the dwelling leased by the defendant after alterations of the duplex structure did not constitute controlled housing accommodations.

4. The Court below erred in denying an injunction as the complaint prayed, restraining the defendant from further rent overcharges in violation of the Act and Regulation.

5. The Court below erred in failing to enter an order requiring the defendant to refund to the tenant, Matthew S. Weiser, amounts received in excess of the lawful maximum rental.

6. The Court below erred in failing to grant judgment in favor of plaintiff and against the defendant.

ARGUMENT

I

The Court below erred in permitting the defendant to contest at trial findings of fact in the order of the Area Rent Director that the housing accommodations did not qualify for decontrol, in the absence of defendant having first exhausted the administrative remedies provided by the Act and Procedural Regulation for review of such order

The defendant both in her answer and upon trial admitted receipt of the amount of \$1,100.00 which the

complaint alleged was received in excess of the lawful maximum rental (R. 3, 9, 33). However, at the commencement of trial defense counsel stated as "the contention of the defendant," that "the Housing Expediter exceeded his authority and jurisdiction and went beyond the scope of his power in determining a rent ceiling for this particular property" (R. 33). In response to such contention counsel for plaintiff stated (R. 36):

The rent regulation, procedure regulation, provides upon rejection of application for order of decontrol that the owner then has the right to appeal to the regional administrator. It further provides for direct protest to the national administrator. In the instant case none of those remedies have been sought. It is our position, as a matter of law, in order to be permitted to raise those questions in this court, while this court ultimately would have the jurisdiction to consider those matters, I think the rule is well settled that a person has first to exhaust his administrative remedies.

It is submitted that the rule referred to should have been applied, and that it was clearly error for the lower Court to permit the validity of the order rejecting decontrol to be contested (R. 68, 70).

As this Court held in *La Verne Co-op Citrus Assn. v. United States*, 143 F. 2d 415, "The principle that administrative remedies must be exhausted before one may resort to equity is well established." See too, *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41; *Yakus v. United States*, 321 U. S. 414; *Macauley v. Waterman Steamship Corp.*, 327 U. S.

540, 544; *Aircraft Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752; *Gates v. Woods*, 169 F. 2d 440 (C. A. 4th); *Koster v. Turchi*, 173 F. 2d 605, 608 (C. A. 3d). Applying the same rule to administrative orders entered pursuant to Rent Regulations under the Emergency Price Control Act of 1942, as amended, and the Housing and Rent Act of 1947 are the recent decisions of this Court not yet reported of *Woods v. Kaye*, No. 12029, decided June 22, and *Babcock v. Koepke*, No. 12118, decided June 24, 1949. See, too, *Smith v. Duldner* (C. A. 6th), No. 10825, decided July 5, 1949, not yet reported; *Woods v. Durr* (C. A. 3rd), No. 9811, decided June 29, 1949, not yet reported.

In *Woods v. Kaye*, *supra*, the Area Rent Director issued an order pursuant to Section 4 (e) of the 1942 Regulation decreasing the rent of a housing accommodation from the first rental of \$150.00 per month. The landlord having failed to register the accommodation within the time required by Section 3 of the same Regulation the order was made retroactive from the date when the house was first rented, and the excess rent collected was ordered refunded to the tenant. In an action by the Housing Expediter under Section 205 (a) of the 1942 Act, to compel restitution the defendant challenged the retroactive aspect of the order and the trial Court found the order to be invalid. In reversing such judgment this Court said (pp. 4-5, Slip Opinion):

The administrative findings of fact underlying the retroactivity of the order are to be viewed in no different light than those upon

which the maximum rent figure of \$75 per month was based, and we cannot conceive of the sufficiency of those facts being tested in the District Court. It would thus seem clear, in this situation, that the District Court is bound by these findings. The failure of the landlord to properly follow the procedure of review provided, results in a bar to contesting the enforcement action in the District Court.

While the review procedure considered in the *Kaye* case involved the sole jurisdiction of the Emergency Court of Appeals to review the order there involved, in *Babcock v. Koepke, supra*, this Court applied the rule requiring exhaustion of administrative remedies to the procedure for review of orders of an Area Rent Director as provided by Revised Rent Procedural Regulation 1 issued by the Housing Expediter pursuant to Section 204 (d) of the 1947 Act.¹² In the cited decision an action was sought to be maintained by plaintiff against Koepke, Individually and as Rent Director of the Los Angeles Defense-Rental Area, seeking a declaratory judgment that certain premises owned by plaintiff were not subject to control under the 1947 Act. The complaint sought a preliminary injunction to restrain the defendant from issuing a threatened order to fix rents

¹² Revised Rent Procedural Regulation 1, effective May 1, 1948 (13 F. R. 2369), is a revision of Rent Procedural Regulation 1 (*supra*, p. 4), which was in effect on September 9, 1947, when the order rejecting decontrol of the housing accommodations in the case at bar was entered (R. 12-13, 115). Section 840.11 of the Revised Regulation referred to in the *Koepke* decision contains substantially the same provisions as Section 840.23 of the Regulation before revision which section is there entitled *Landlord's Application for Review of Rent Director's Action (infra*, p. 57).

in an amount considerably less than plaintiff's leases of the accommodations provided should be paid and requiring refund of excess rents collected. In reviewing a judgment dismissing the complaint this Court said (p. 2, Slip Opinion):

The parties are agreed that there is a justiciable issue between them as to whether the premises are in the appellee's control under the 1947 act. That act provides a method of adjudicating the issue in the administrative procedure of the rent control agency. The court's dismissal of the complaint for a declaratory judgment was on the ground that appellant had not exhausted this administrative remedy.

After considering the applicable sections of the Regulation and the reason advanced by plaintiff for not following the administrative procedure there provided, the Court went on to say (Slip Opinion pp. 3-4):

We think, however, that appellant could have presented his contention of noncontrol under the Section cited *supra*, [840.11] and that he failed to exhaust his administrative remedy by not so acting. If he there had prevailed, there would be no occasion to invoke the challenged provisions of 840.11.

We agree that the district court properly dismissed the complaint, and affirm the judgment.

In *Smith v. Duldner, supra*, an action was sought to be maintained against the defendant, Rent Director, to enjoin enforcement of an order reducing rents on certain rooming house living units. The

action was dismissed on the ground, among others, that under Rent Procedural Regulation 1, plaintiff was entitled to review of and appeal from such order which remedy at law must be presumed to be adequate. In affirming judgment of dismissal the Court said:

Furthermore, in Rent Procedural Regulation No. 1, an orderly procedure is prescribed for the Rent Control authority in making the various kinds of determination in connection with the establishment of maximum rents. For a landlord aggrieved by a determination there is provided the right of administrative appeal from the Rent Director to the Regional Rent Administrator and from him to the Housing Expediter. Appellant never attempted to avail herself of these administrative remedies.

In considering plaintiff's contention that the procedure provided by the Act and Regulation does not satisfy the requirements of due process and are thus invalid and unconstitutional the Court further stated:

The regulation, in carrying out the objectives of the Act, is designed for the purpose of affording appellant a plain, adequate, and complete remedy at law for the rights she relies upon. Until she has availed herself of these administrative remedies and been deprived of rights guaranteed her under the constitution, it can not be said she has been denied due process. Since appellant did not exhaust her administrative remedies, her petition for an injunction was properly denied, and her complaint dismissed.

In *La Verne Co-op Citrus Assn. v. United States*, *supra*, this Court determined that the rule as to exhaustion of administrative remedies applies equally where the validity of an administrative order is challenged by way of defense to its enforcement as well as in cases where invalidity of the order is sought by affirmative relief. As the Court there said (143 F. 2d pp. 419, 420):

A study of relevant decisions leaves no doubt that an equity court has no jurisdiction to examine the validity of an administrative order where the administrative remedy has not been invoked or has not been completed and where the one harmed by the administrative order is the moving party in the equity action. * * *

The question then arises whether the administrative remedy rule applies where the one harmed by the administrative order is the defending party in the equity action. The doctrines of primary jurisdiction and of administrative finality are equally persuasive where the issue is raised by defending parties as where it is raised by moving parties. A consideration of the defense in an enforcement action would nullify the uniformity achieved by devising a single procedure for testing orders promulgated in accordance with the terms of the Act.

To the same effect as the cited decision are *Yakus v. United States*, *supra*, 321 U. S. pp. 434, 435 and *United States v. Ruzicka*, 329 U. S. 287, pp. 293-294.

It is therefore respectfully submitted that the Court below clearly erred in permitting the defendant

to challenge the validity of the administrative order in the present proceeding.

1. The procedure followed by defendant was not in compliance with the provisions of Procedural Regulation 1, and there was no basis for the lower Court to hold that the defendant did not fail to pursue the administrative remedies available for review of the order denying decontrol of the remodeled dwelling

As earlier pointed out (*supra*, p. 4), the above Procedural Regulation in implementing Section 202 (c) (3) of the Act sets forth a clearly defined procedure for review of the order which the defendant challenged (R. 12, 115).¹³ Such order was issued September 9, 1947 (R. 71). By letter of the same date the Rent Director advised defendant's attorney, Charles L. Richards, to such effect (R. 119). The defendant, however, made no effort to follow the review procedure provided in Section 840.23 of the Regulation by appeal to the Regional Rent Administrator (R. 36, 37, *infra*, p. 57). On the contrary de-

¹³ In *Gates v. Woods*, *supra*, the Court of Appeals for the Fourth Circuit referred to the procedural regulation here involved and the requirement of exhausting administrative remedies in the language (169 F. 2d pp. 442, 443) :

"Furthermore, in Rent Procedural Regulation 1 (12 F. R. 916, 5923) an orderly, simple and efficient procedure is prescribed for the Office of Rent Control, Office of the Housing Expediter, in making the various kinds of determinations in connection with establishment of maximum rents. For a landlord aggrieved by a determination there is provided the right of administrative appeal from the Rent Director to the Regional Rent Administrator and from there to the Housing Expediter. §§ 840.08, 840.23-840.45 of Rent Procedural Regulation 1. * * *

"The rule as to the exhaustion of administrative remedies applies just as forcibly when, as here, the contention is made that the administrative agency lacked jurisdiction over the subject-matter. See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, 58 S. Ct. 459, 82 L. Ed. 638, and cases there cited."

fendant by her attorney elected to present the matter to the rent advisory board of the Area Rent Office (R. 37, 119).

The defendant in such procedure was in no way "misled" by any representative of the Office of the Housing Expediter or "encouraged" in "the submission of this question to the local advisory board," as expressions of the trial Court inferred (R. 48, 50). On the other hand, the procedure thus followed was deliberately adopted by defendant's attorney. This fact is established by Mr. Richards' letter of September 17, 1947 (R. 119), in response to the Rent Director's advice that the order rejecting decontrol had been entered (R. 71). As appears from such letter, defendant's attorney was not only aware of the administrative procedure for "taking the matter up with the Regional Office," but also that he preferred to "delay" such action until "the facts as we see them" had been presented to the board appointed by the Governor (R. 119). From the same letter it is equally clear that Mr. Richards was familiar with Section 204 (e) (1) of the Act which provided in effect for such board to "act only in an 'advisory' capacity." Under such Section 204 (e) (1), the "local advisory board" which the Housing Expediter was authorized to create by nomination of members for appointment by State Governors, was empowered only to make "recommendations" to officials administering the Act within local areas "in individual adjustment cases," and to make "recommendations" to the Expediter only with respect to definitely prescribed matters (*infra*, p. 53). The board was in-

vested with no review or appeal jurisdiction. It follows that defendant's election of first "presenting the facts" to such board with respect to the order of the Rent Director in question was in no respect a compliance with the procedure for review provided by the Regulation (*infra*, p. 55).

Nor was there any supporting basis in defendant's further procedure for the trial Court to "assume" that "they [the defendant] might be somewhat excused for failure to follow this regulation that would require appeal to the regional rent director and then from there to the expediter" (R. 50), or for the further expression of the Court that "It is evident that the office of housing expediter or regional director or someone cooperated with the defendant in getting this matter before the local advisory board" (R. 51). In the same connection the Court below remarked at trial that "It could be" that by such "cooperation of the office of housing expediter or any of his subordinates," the defendant "could have overlooked or could have been blinded" as to "these regulations or procedures" governing the administrative review process (R. 51). The facts are directly to the contrary. Moreover, by publication of Procedural Regulation 1 in the Federal Register (12 F. R. 5916), the defendant and her attorney were charged with notice of the procedure for review and appeal there provided¹⁴ cf. *Flannagan v. United*

¹⁴ Title 44 U. S. C. § 307 among other recitals provides in effect that the filing of any document for Federal Register publication "shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby."

States, 145 F. 2d 740, 741 (C. A. 9th), *Hagen v. Porter*, 156 F. 2d 362 (C. A. 9th). And as appears from his letter of September 17, 1947 to the Rent Director, defendant's attorney had actual knowledge of such procedure (R. 119).

The defendant's attorney elected to first proceed with the local advisory board without suggestion or advice by the Rent Director or any other officer of the Housing Expediter. Not only was such procedure by deliberate choice, but her attorney purposely chose to "delay taking the matter up with the Regional Office at San Francisco," until the matter had been presented to the local board (R. 119). Due to the refusal of certain appointed members to serve, the board organization was not completed until October 21, 1947 (R. 43). Of such fact the Area Director advised defendant's attorney on the following day, with a subsequent letter of November 10th advising of the next board meeting on November 13th (R. 43-44). In such correspondence the Rent Director was complying only with the request of defendant's attorney for "definite information" when organization of the board "will be completed and ready for action" (R. 119). In the Director's letter of November 10, 1947, it was stated that Mr. Richards and his client, Mrs. Ginocchio, "may be present," at the board meeting there referred to, "to present such facts as you deem pertinent in this case" (R. 44). The defendant though testifying at the trial (R. 88), did not state whether she or her attorney attended any board meeting at which her "complaint" was considered (R. 43).

On November 25, 1947, the advisory board by its chairman, addressed a letter to the defendant and her husband, with a copy to her attorney, which advised of the board's "recommendation" that the premises as altered from the former duplex structure "must remain under its original control status" (R. 121). The same letter advised of the board's view that the defendant was entitled to apply to the Area Rent Office "for an adjustment of rent" (R. 122). The defendant, however, made no application for such adjustment, thus declining to avail herself of a further administrative remedy provided by the Act and Rent Regulation.¹⁵ As previously pointed out (*supra*, p. 8), the Rent Director as early as August 13, 1947, had advised defendant of the procedure to be followed in applying for such adjustment but no application for rent increase was filed (R. 109).

Following advice of the board's "recommendation" there was no further communications between the defendant and her attorney and the Area Rent Office. The course taken by the defendant was of substantially the same character as recognized by this Court in *Woods v. Kaye*, *supra*, quoting from the concurring opinion of Mr. Justice Rutledge in *Bowles v. Willingham*, 321 U. S. 503, p. 527:

Accordingly, by declining to take the plain way opened to her, more inconvenient though that may have been, and taking her misconceived remedy by another route, she has arrived

¹⁵ The material portions of Section 5 (a) of the Rent Regulation providing for increase of maximum rent upon "the filing by a landlord of a petition for adjustment," appear in footnote, *supra*, p. 8.

where she might well have expected, at the wrong end.

2. Under any view of the facts there was no basis to hold that the defendant had exhausted the administrative remedies provided by the Act and Procedural Regulation

Considering the procedure followed by defendant, the Court below upon trial stated, "I am going to hold that administrative remedies have been exhausted" (R. 68), and in overruling the objection of plaintiff to the defendant contesting the findings of the Rent Director's order the Court further remarked (R. 70):

* * * so I am going to hold now that the defendants in this case have not failed to follow the administrative procedures.

It is submitted that such ruling was clearly erroneous. Not only did the defendant fail to follow the prescribed administrative review in the procedure adopted by her attorney before the rent advisory board, but after communicating with the Regional Administrator, she failed to exhaust the administrative remedies which continued available. The defendant made no attempt to file an appeal with the Office of the Housing Expediter in Washington, D. C., as Section 840.25 of the Procedural Regulation expressly provided (*infra*, p. 59).

Section 840.23 (b) of the Regulation prescribes a period of sixty days from the date of issuance in which to file an application for review of a Rent Director's order, or dismissal of the application if not filed within such period unless special circumstances are shown to justify a later filing (*infra*, p. 58). Sixty days from September 9, 1947, on which date the order

rejecting decontrol was entered (R. 115) expired November 8, 1947. Over such period defendant filed no application for review. Nor did the defendant make any application for an extension of the review period.

The rent advisory board was invested with no authority to enter an order determining control of the housing accommodations. Procedural Regulation 1 contained no provision for appeal from any action by the board, and there existed no basis for review of the board's recommendation communicated to the defendant November 25, 1947, that "the property must remain under its original controlled status" (R. 121). Thus the defendant allowed the period for review as prescribed by the Regulation to completely expire without availing herself of the administrative remedies there provided. Over the entire sixty days from September 9, 1947, the "delay" of her attorney (R. 40), "in taking the matter up with the Regional Office in San Francisco," continued. It follows that her attorney's letter of December 20, 1947, addressed to the Regional Administrator and enclosing copy of "Complaint" (R. 44) presented to the advisory board, did not constitute compliance with the Procedural Regulation.

The Court below, however, proceeded upon the view that "the time for application of administrative remedies" should be considered "beginning * * * as November 25, 1947, the date of the board's recommendation" (R. 121). The trial Court further expressed the view that it would "be only fair * * * to

consider that the defendant had appealed to the regional director" (R. 53), by her attorney's communication of December 20, 1947, to Ward Cox, the Regional Administrator. Such letter in part reads (R. 44-45):

I am writing you on behalf of my client, Mrs. Ginocchio, re the above subject matter. She has requested that I do so as a result of a conversation between you over the phone, wherein you requested a copy of my Complaint together with "points" and "citations" presented to the Office of Rent Control in Reno.

The defendant upon testifying at trial (R. 88) was not questioned concerning her conversation with Mr. Cox (R. 53) to which the above letter refers, and the nature of such conversation is not disclosed.

On January 2, 1948, the Regional Administrator replied to the foregoing letter (R. 39-40). Such response noted that the "complaint" enclosed "was addressed to the Reno Rent Advisory Board," and further advised (R. 40):

We do not find sufficient facts stated in the complaint to be able to determine whether or not the action of the area rent office was correct. We are writing to the area office today for a report and as soon as we receive their reply we will communicate with you further.

For your information, Rent Procedural Regulation 1 sets forth the procedure for filing appeal from decision of the area rent director. We attach a copy hereto and call your attention to Section 840.23 providing for filing of an Application for Review to be conducted by the Regional Rent Administrator. Form D9

for that purpose may be obtained in the area rent office.

Subpart B, Section 840.25, sets forth the procedure for filing an appeal with our Washington office.

Thus defendant's attorney was definitely advised of the procedure to be followed in applying for review by the Regional Administrator. However, under the procedure definitely set forth, the defendant made no attempt to appeal either to the Regional Administrator or to the Housing Expediter (R. 40). Thereafter there was no further communications from the defendant or her attorney to the Regional Administrator. In a letter dated February 10, 1948, the Administrator advised her attorney as follows (R. 44):

This is in further reference to our letter to you dated January 2, 1948.

Upon investigation, we find that the proceedings in the area rent office were handled in accordance with the Rent Regulations and an interpretation of the regulation by the Regional Attorney.

As suit has now been filed, decision in this case rests with the court.

Based upon the foregoing correspondence the trial Court in effect held that "the regional director made a decision in this case on February 10, 1948," and as the Court further stated, "it doesn't make any difference whether he handed it to him through the back door or the front door, he handed them a decision" (R. 70).

The review period from the order of September 9, 1947, having expired under the Regulation there was

Their failure to do so cannot be used to support their argument that due process has been denied them, particularly since they have not shown inadequacy with respect to the available administrative relief. *Yakus v. United States*, 64 S. Ct. 660; *Natural Gas Pipeline Co. v. Slattery*, 302 U. S. 300, 310, 58 S. Ct. 199, 82 L. Ed. 276.

Also, in *Yakus v. United States*, *supra*, the Supreme Court gave effect to the same principle in the language (321 U. S. p. 434):

In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by "loading the record against them" or denying such hearing as the Constitution prescribes.

It may be contended from a statement in the Administrator's letter of February 10th that as a suit had been filed, "decision in this case rests with the court" (R. 44), that the defendant was led to believe she had no further administrative remedies to exhaust or that it was unnecessary to exhaust such remedies. It is submitted that the letter supports no such assumption and the defendant though testifying upon trial (R. 88), made no claim that she or her attorney had been misled by any representative of the Office of the Housing Expediter in adopting the procedure which was followed.

Giving full effect, however, to the suggested contention, the same furnishes no basis to sustain the

lower Court's ruling. After holding that defendant had not failed "to follow the administrative procedures" and hearing testimony (R. 70), the trial Court predicated judgment on the erroneous theory that by alteration of the duplex structure to a single living unit "additional housing accommodations were created," so that the entire remodeled house was decontrolled under the Act and Regulation (R. 108). Taking the view most favorable to the defendant there was no basis for entering such judgment. The course which the trial Court might properly have followed would have been to stay the present enforcement proceeding to afford defendant opportunity to exhaust the administrative remedies which she may have believed were unnecessary to pursue because of the afore-mentioned letter. It follows that the Court below erred in holding that administrative remedies had been "exhausted" and in entering judgment as described.

II

The Court below erred in holding that the single dwelling unit resulting from alteration of the duplex structure did not constitute controlled housing accommodations

In holding at the conclusion of trial, that "on or after February 1, 1947, additional housing accommodations were created by conversion of these premises," and that such premises were "decontrolled" under the Act of 1947 (R. 108), the Court below stated no reasons as the basis for such ruling. Nor does the record disclose any supporting basis. The trial Court appeared to have disregarded the fact that the entire structure, and not the separate

rooms therein existing after the alterations, constituted the housing accommodations involved; also, that in the former duplex there were two complete living units, while after the alterations there was only one dwelling unit (R. 79). It was the single dwelling as thus altered that the defendant leased on July 30, 1947, at the rental of \$250.00 per month (R. 44, 110). It was for such living unit that defendant filed application for decontrol and to which the order rejecting decontrol applied (R. 78, 82, 115). Upon these facts the trial Court's determination (R. 108), "that these premises are decontrolled under the housing act of 1947," was clearly erroneous.

1. Under the official interpretation of the Housing Expediter the altered living unit did not constitute "additional housing accommodations created by conversion," subsequent to February 1, 1947

On August 25, 1948, the Housing Expediter issued an official interpretation of Section 202 (c) (3) of the Housing and Rent Act of 1947, as amended, and of Section 1 (b) of the 1947 Regulation, as amended¹⁶ which in the material portions thereof provides (13 F. R. 5001, 5002):¹⁷

The following is an interpretation of those provisions of the Rent Regulations and of the

¹⁶ By amendment effective April 1, 1948 (13 F. R. 1861), the Controlled Housing Rent Regulation was amended, but by such amendment there remained unchanged the exemption formerly stated in Section 1 (b) (8) (i) of the Regulation (*supra*, p. 3), of "additional housing accommodations created by conversion on or after February 1, 1947."

¹⁷ The Federal Register Act, 44 U. S. C. A. Section 307, provides that the Federal Register "shall be judicially noticed * * *". cf. *Flannagan v. United States*, 145 F. 2d 740, 741 (C. A. 9th), (*supra*, p. 25), and *Hagen v. Porter*, 156 F. 2d 362 (C. A. 9th).

Housing and Rent Act of 1947, as amended, which provide for decontrol of the classes of housing accommodations listed below: * * *
The classes of housing accommodations covered by this interpretation are the following:

* * * * *

V. Additional housing accommodations created by conversion on or after February 1, 1947.

* * * * *

5. *Requirement that additional housing accommodations result from the alterations or remodeling.* Where there has been a structural change involving substantial alteration or remodeling, decontrol occurs only if additional housing accommodations result from this work. This determination is made with respect to the dwelling involved in the creation of additional housing accommodations. * * *

6. *Basis for determining whether additional housing accommodations have been created.* In determining whether additional housing accommodations have been created, the primary test is not whether there are more tenants in occupancy than before the conversion, nor whether there is more floor space. The determination is made by comparing the number of dwelling units before and after the conversion. * * *

It is true that the structural changes here considered did involve substantial alterations of the duplex arrangement. As a result of these substantial alterations, appellee could have applied for an adjustment in rent (cf. *Woods v. Olinger*, 170 F. 2d 895

(C. A. 5th); *Dodge v. Woods*, 170 F. 2d 761 (C. A. 1st); *Elma Realty Co. v. Woods*, 169 F. 2d 173 (C. A. 1st). But under the Act, Regulation and foregoing interpretation the resulting single unit was not de-controlled. When Congress used the words "additional housing accommodations," it obviously did not mean merely "additional rooms." The "basis" fixed by the Regulation and interpretation "for determining whether additional housing accommodations have been created" is wholly consistent with the Act. Such "determination" is reached "by comparing the number of dwelling units before and after the conversion," which is the only realistic and common sense view to take. From such comparison where the two dwelling units had formerly existed in the duplex, there remained after the change only the single family dwelling as originally constructed (R. 79, 83, 90). Thus the number of living units was diminished instead of being increased as a "result" of the alterations (R. 79). The interpretation requires, also, that the "determination" whether additional housing accommodations have resulted from the structural changes must be made from the dwelling unit or units "necessarily involved" in the creation of additional accommodations. So, considering in this regard either the duplex units existing prior to the change or the entire structure after alterations had been completed, only one dwelling unit resulted.

The weight to be accorded to administrative interpretations has been clearly stated by this Court. As said in *Bowles v. Wheeler*, 152 F. 2d 34 (C. A.

9th), certiorari denied, 326 U. S. 775, with respect to the Price Administrator's interpretation of the Emergency Price Control Act of 1942 (at p. 38):

His interpretation of the Act and the applicability of the regulations issued under authority of the Act are entitled to great weight and serious consideration.

And in *Porter v. Crawford & Doherty Foundry Co.*, 154 F. 2d 431 (C. A. 9th), certiorari denied, 329 U. S. 720, the Court said in referring to an interpretation of regulations issued under the same Act (at p. 433):

Since such administrative construction is not irrational, its interpretations are binding upon the courts.

See too (*Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414;¹⁸ *Bowles v. Mannie*, 155 F. 2d 129, 133 (C. A. 7th), certiorari denied, 329 U. S. 736; *Porter v. Royal Packing Company*, 157 F. 2d 524 (C. A. 8th); *Bowles v. Malas*, 81 F. Supp. 485 (D. C. Wis.)).

It follows that under the interpretation considered the single dwelling unit was not "decontrolled" and the Court below clearly erred in so holding (R. 22, 108).

¹⁸ In *Bowles v. Seminole Rock & Sand Co.*, *supra*, the Supreme Court in following the Price Administrator's interpretation of a regulation under the former Emergency Price Control Act said (325 U. S. p. 414):

"The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

2. So far as material to the question of decontrol, the result of the alterations was to create only more floor space in the single living unit, which change did not render the unit exempt from control under the Act and Rent Regulation

In the single dwelling unit which replaced the duplex arrangement 240 square feet of space were added to the floor plan of the one story structure (R. 90, 95, 121). But as stated in the official interpretation, the "primary test" in "determining whether additional housing accommodations have been created, * * * is not whether there are more tenants in occupancy than before the conversion, nor whether there is more floor space" (*supra*, p. 37). The determination respecting decontrol being made only by "comparing the number of dwelling units before and after the conversion," it follows that the creation of such additional space furnished no basis for decontrol of the single dwelling. That the addition of such space was the only result of the alterations so far as material to control exemption is established by the structural changes. The material facts in this connection will be briefly considered.

Exhibits "H," "I," and "J" of the defendant at trial are blueprints of original tracings showing; respectively, the floor plan of the duplex structure, the floor plan of the building after the alterations had been completed, and the floor space of the basement in the altered single unit (R. 74, 75, 88, 89, 91). Photographs numbered 1 to 8 inclusive were received in evidence as defendant's Exhibit "L" (R. 95, 96). The original exhibits referred to have been transmitted for examination by this Court. While the defendant testified at length (R. 88-101), respecting

such Exhibits and the nature of the alterations, the material facts in this connection may be in substance stated: In the duplex there were a total of three bedrooms, two in the north, or rear unit, and one in the front or southern unit (Exhibit "H"). In the single unit after the alterations two bedrooms were added, with an additional bedroom in the basement (Exhibit "H" and "I," R. 86). The partition or wall separating the duplex units was removed (R. 80, 90).

The northern, or rear unit of the duplex of the street number 415½ consisted of two bedrooms, a living room, breakfast nook, kitchen, bath, and screen porch (Exhibit "H"). In the alterations another bedroom was added by changing the living room of the former unit to such type of occupancy (R. 85, Exhibits "H" and "I"). The two bedrooms formerly existing in the duplex were "identical with the bedrooms" in the resulting single dwelling unit (R. 85). The bath as attached to such bedrooms remained in "exactly the same position" as it was as a duplex (R. 86). The space designated as a screen porch in this unit was changed to constitute a breakfast room in the single dwelling with some additional space added (R. 98, Exhibits "H" and "I").

The southern, or front duplex unit numbered 415, consisted of a bedroom, bath, kitchen with breakfast nook attached, and a living room and dinette (Exhibit "H," R. 88). In the altered single unit the living room space remained substantially unchanged except for the addition to the front end of the house of a reception room (R. 87, 90, Exhibits

application for an increase of rental or approval thereof. Subsequently, upon application of the defendant-landlord, the Rent Director entered an order increasing the allowable rent from \$4.00 per week to \$7.00 for occupancy by one or two persons, and \$8.50 per week for occupancy by three or more persons. The Court held that under the interpretation of the Housing Expediter referred to (*supra*, p. 36), the altered accommodations were not subject to decontrol. In arriving at this determination the Court said (*infra*, p. 63):

The question first and chiefly encountered is whether the alterations effected the decontrol of the accommodation, with the consequence of removing its amenability to regulation. That question has to be answered negatively. Before the improvements the accommodation was a single housing unit. Thereafter, though substantially enlarged and improved, it was still a single housing unit. It was much larger in floor space and number of rooms and superior in furnished facilities and equipment. Nevertheless it was residential space for only one social or family unit, though it could easily include more members than might comfortably have been sheltered in the sleeping room.

After referring to Section 202 (c) (3) of the Act and to the interpretation thereof by the Housing Expediter, the Court held that such "interpretation * * * is in harmony with the purpose of the Act," and should be given effect in holding the altered housing accommodations not subject to decontrol (*infra*, p. 65).

Other unreported decisions in which the foregoing official interpretation has been followed are *Woods v. Rettas* (D. C. N. D. N. Y.), No. 3173, decided March 25, 1949, and *Woods v. Anderson* (D. C. E. D. Mich.), No. 7977, decided June 20, 1949.²⁰ In the *Rettas* decision the defendants made substantial alterations by converting premises from a two-family to a three-family house, and modernized the second floor apartment by installation of new plumbing, fixtures, and cabinets. In such alteration a stairway leading from the second floor apartment was enlarged for access to an upper floor and a new apartment was created on the third floor. Following the official interpretation, the Court held that after such alterations the second floor apartment did not constitute "additional housing accommodations created by conversion," and were not removed from control under the provisions of the Act in Section 202 (c) (3).

Woods v. Anderson, supra, involved premises consisting of four unfurnished five room dwelling accommodations, each containing a living room, dining room, two bedrooms, kitchen, and bathroom, and each occupied by one family. After the four families had vacated, the defendant painted and redecorated the accommodations, placed a frigidaire and stove in each of the four kitchens, installed furnaces, hot water tank, gutters, a wiring system, and put locks on the doors. Some janitor service and some furnishings were also provided. The defendant then rented each of the five-room units to two families. One family occupied the

²⁰ Findings of fact and conclusions of law in these decisions appear in the Appendix (*infra*, pp. 69, 72).

living room and dining room of the unit, the other family occupied the two bedrooms, and both families shared the kitchen and bathroom. The Court held that the services and equipment furnished and the painting and decorating performed by the defendant did not constitute "a conversion." As the Court found, "On the contrary there resulted a restriction in the housing accommodations in that where formerly one family had the use of the kitchen and bathroom, after the change in rental plan, two families shared the kitchen and bathroom" (*infra*, p. 74). Upon the same basis where the duplex structure in the case at bar formerly afforded two separate dwelling units, the remaining single unit existing after the alteration manifestly did not constitute additional housing accommodations.

In *Woods v. MacNeil Bros. Co.* 80 F. Supp. 920 (D. C. Mass.), it was held that the mere providing of additional facilities to improve existing accommodations did not constitute new accommodations within the exemption provided in Section 202 (c) (3) of the Act. So there was no basis for decontrol of the single dwelling unit here involved by reason of the installation of new plumbing, fixtures (R. 99-100), addition to the roof space (R. 95, 98), the construction of a new chimney (R. 95) and by improvement of the heating arrangements (R. 92).

Only one dwelling unit existing instead of the two former units of the duplex, defendant's application for decontrol and the Director's order rejecting decontrol (R. 115), related not to the two additional rooms resulting from the alterations but to the single remaining unit. It was such entire unit that the de-

fendant leased at a monthly rental admittedly in excess of the established legal maximum (R. 11, 14, 94, 110). It follows that it was manifest error for the Court below to hold that such single unit constituted "additional housing accommodations" (R. 108).

It can be readily understood how easily the intention of Congress to achieve effective rent control could be defeated if the exemption²¹ provided by Section 202 (c) (3) of the Act were extended to landlords who merely made substantial alterations in living units but did not create additional housing accommodations. To accept that view would render wholly unnecessary the adjustment provisions available under the Act and Regulation when substantial alterations have been made. It would be an invitation to short-circuit the adjustment provisions and resort to making substantial alterations solely for the purpose of claiming the exemption provided by the Act where additional accommodations are created. This result must be rejected since it is clearly inconsistent with the language of the Act and the intent of Congress.

²¹ The rule of construction of exemptions from remedial legislation was more recently stated by the Supreme Court in *Phillips Company v. Walling*, 324 U. S. 490, 493, as follows:

"Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."

For application of this rule by this Court in its construction of various other statutes, see, *Canadian Pacific Ry. Company v. United States*, 73 F. 2d 831 (C. A. 9th); *Reynolds v. Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C. A. 9th); *McCauley v. Makah Indian Tribe*, 128 F. 2d 867 (C. A. 9th).

III

The Court below erred in failing to grant judgment in favor of plaintiff and to award restitution and injunctive relief as the complaint prayed

1. The trial Court should have ordered the defendant to restore to the tenant the excess rental admittedly collected

As the single dwelling unit did not constitute "additional housing accommodations" and remained subject to control under the Act and Regulation, the defendant violated Section 204 (b) of the Act (*infra*, p. 52), in charging and receiving from the tenant, Weiser, the monthly rental of \$250.00 (R. 110). The defendant admitted (R. 11, 14), that the sum of \$180.00 per month, as fixed by the Director's order of December 12, 1947 (R. 118) constituted the lawful maximum for the period from August 1, 1947, to December 31, of the same year. But for such period the defendant admittedly charged and received the following amounts (R. 15, 33, 111, 116) :

Rent for August 1947, and in advance for the last five months of the lease, from March 1, 1949, to July 31, 1949, as recited in lease, 6 months at \$250 per month--	\$1, 500
Rent at the same figure for the months of September and October 1947-----	500
Total -----	\$2, 000

For the five month period from August 1, 1947, to December 12, 1947, as alleged in the complaint, the defendant was entitled to receive only the lawful maximum of \$180 per month and totaling \$900 for such period. There remained accordingly the overcharge of \$1,100 which the trial Court permitted the defendant to retain by denial of the prayer for restitution (R. 108).

In *Woods v. Richman*, 174 F. 2d 614, this Court observed that restitution of rent overcharges was there sought, in part "under the provisions of Section 205 (a) of the 1942 Act and the substantially identical provisions of Section 206 (b) of the 1947 Act" (p. 615). And in considering the right to such relief under the same Act, the Court said (p. 616):

We think, therefore, that it continues to be appropriate for the courts to consider whether an order of restitution should be made as a means of giving effect to the declared policy of Congress.

In *Gates v. Woods* (C. A. 4th), (*supra*, p. 23), two separate appeals were considered, in one of which the defendant-landlord appealed from an order of restitution and injunction restraining rent overcharges. In affirming such order the Court said (169 F. 2d, p. 443), "The power to order restitution of excess rentals seems clear," citing *Porter v. Warner Holding Co.*, 328 U. S. 395.

It is true that the award of such relief was discretionary with the trial Court, but the rent overcharges by the defendant were wilful and deliberate. Although advised both by the Rent Director (R. 109), and by the rent advisory board of her right to a rent adjustment (R. 121-122), the defendant made no effort to avail herself of this remedy and deliberately leased the accommodations at a rental charge \$70 in excess of the admitted legal maximum (R. 15, 111). Under these facts restitution clearly should have been awarded. In *Woods v. Witzke*, No. 10797 (C. A. 6th) decided May 11, 1949, not yet reported, there was

considered the collection of rental overcharges based upon a finding "that the violation was wilful." As the Court said in reversing judgment which failed to award restitution, "That being so it would seem that the Court, in the exercise of a sound discretion, should have granted restitution to the full amount of the excess rent collected." It is submitted that such rule should have been applied by the trial Court here. cf. *Porter v. Crawford & Doherty Foundry Co.* (*supra*, p. 39), where this Court observed that failure of the defendants to apply for adjustment of prices on the commodity there involved, which was sold for amounts in excess of the lawful maximum, constituted a wilful violation of the applicable price regulation (154 F. 2d p. 435).

2. The Court below should have granted the injunctive relief which the complaint prayed

There being no basis for the lower Court's finding (R. 22, 108), that "additional housing accommodations were created" by alteration of the duplex unit, and defendant admitting, in effect (R. 15, 33), that the rent overcharges were wilfully collected, the Court below should have granted the injunction to restrain defendant from receiving further rents in violation of the Act and Rent Regulation (R. 3). While this Court in *Bowles v. Quon*, 154 F. 2d 72 (C. A. 9th), stated the rule that the "granting or refusing of an injunction was a matter resting within the discretion of the trial court," in the same decision the Court said (at p. 73): "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence * * *." (See, too, *Hecht v. Bowles*,

321 U. S. 321.) It follows that the trial Court clearly erred in denying the injunction (R. 23, 108), where under the Act, the Rent Regulation and the official interpretation of the Housing Expediter, the single dwelling unit was not eligible for decontrol.

CONCLUSION

Viewing either the defendant's failure to exhaust administrative remedies for review of the order rejecting decontrol of the single dwelling unit or the facts which clearly establish that such unit did not constitute "additional housing accommodations created by conversion" within the meaning of the Act and Regulation, there is no basis upon which the judgment appealed from can be supported. It is submitted, therefore, that the judgment be reversed with directions to the Court below to grant the relief of restitution and injunction as the complaint prayed.

Respectfully submitted.

ED DUPREE,

General Counsel,

HUGO V. PRUCHA,

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CECIL H. LICHLITER,

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25, D. C.*

APPENDIX A

Pertinent provisions of the Housing and Rent Act of 1947, as amended (50 U. S. C. App., Secs. 1881, et seq.):

SEC. 202. As used in this title—

(a) * * *

(b) The term “housing accommodations” means any building, structure or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, rooming- or boarding-house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

SEC. 202. As used in this title—

(c) The term “controlled housing accommodations” means housing accommodations in any defense-rental area, except that it does not include—

* * * * *

(3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, * * *

SEC. 204. (b) During the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of

the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: * * *

204 (e) (1) The Housing Expediter is authorized and directed to create in each defense-rental area, or such portion thereof as he may designate, a local advisory board, each such board to consist of not less than five members who are representative citizens of the area, to be appointed by the Housing Expediter, from recommendations made by the respective Governors. Each such board shall have sufficient members to enable it promptly to consider individual adjustment cases coming before it on which the board shall make recommendations to the officials administering this title within its area. The local boards may make such recommendations to the Housing Expediter as they deem advisable with respect to the following matters:

(A) Decontrol of the defense-rental area or any portion thereof;

(B) The adequacy of the general rent level in the area; and

(C) Operations generally of the local rent office, with particular reference to hardship cases.

206 (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Pertinent provisions of the Controlled Housing Rent Regulation (12 F. R. 4331) :

SEC. 1. (b) *Housing to which this regulation does not apply.* This regulation does not apply to the following: * * *

(8) *Accommodations first offered for rent.*

(i) Housing accommodations, the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect; (ii) Housing accommodations which at no time during the period February 1, 1945, to January 31, 1947, both dates inclusive, were rented (other than to members of the immediate family of the occupant) as housing accommodations: *Provided, however,* That all housing accommodations referred to in this paragraph (8) shall be subject to this regulation unless the landlord files in the area rent office a report of decontrol on a form provided by the Expediter within 30 days after July 1, 1947, or within 30 days after the date of first renting, whichever is the later: and *Provided further,* That if a landlord fails to file said report of decontrol within the applicable specified period, such housing accommodations shall be and remain subject to the provisions of this regulation until the date on which he files said report.

For the purposes of this paragraph (8) the construction of housing accommodations is considered completed on the date the last material, fixture or equipment is incorporated into the structure provided the dwelling is suitable for occupancy at that time.

For the purposes of this paragraph (8) the word "conversion" means (1) a change in a structure from a nonhousing use or (2) a structural change in a residential unit or units involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations.

SEC. 4. *Maximum rents*—(a) *Maximum rents in effect on June 30, 1947.* The maximum rent for any housing accommodation under this regulation (unless and until changed by the Expediter as provided in section 5) shall be the maximum rent which was in effect on June 30, 1947, as established under the Emergency Price Control Act of 1942, as amended, and the applicable rent regulation issued thereunder, except as otherwise provided in this section.

Pertinent provisions of Rent Procedural Regulation 1 (12 F. R. 5916):

REPORTS OF AND APPLICATIONS FOR DECONTROL

Introduction. Under section 202 (c) of the Housing and Rent Act of 1947, certain categories of dwelling accommodations are eligible for decontrol. To implement that section of the act and the applicable maximum rent regulations promulgated thereunder, §§ 840.17 through 840.22 provide for appropriate administrative proceedings on such decontrol.

§ 840.17 *Filing of reports of and applications for decontrol.* The appropriate maximum rent regulations contain provisions for the filing of reports of and applications for decontrol of certain categories of dwelling accommodations. The final determination by a rent director upon the filing of such report or application shall be made in the manner set forth below and shall be subject to administrative review as hereinafter provided.

§ 840.18 *Investigation.* Upon the filing of a report of or application for decontrol, the rent director may make such investigation of the facts, hold such conferences and require the filing of such evidence as he may deem necessary or appropriate in the circumstances.

§ 840.19 *Order rejecting report or application.* If the rent director determines that the report or application fails to conform with the provisions of section 202 (c) of the Housing and Rent Act of 1947 and the applicable regulations promulgated thereunder, he shall by order advise the landlord that the report or application has been rejected and that the accommodations concerned therein remain under control. Such order shall state the grounds for the rejection.

§ 840.20 *Landlord's objections; etc., upon order rejecting report or application.* Any landlord who has received an order provided for by § 840.19 may, within thirty (30) days after issuance of the order or the issuance of this part, whichever is later, either request reconsideration of such order, with opportunity to present objections and evidence in support of such objections, or file an application for review or appeal pursuant to § 840.23 or § 840.25 and following of this part. Upon any such reconsideration, the rent director shall either issue an order revoking the prior order rejecting the report or application or shall issue a notice terminating the proceeding upon reconsideration.

§ 840.21 *Proceedings on reports or applications initiated by rent director.* If upon filing of a report of or application for decontrol any element necessary to the determination of a maximum rent for the accommodations concerned therein is in dispute, in doubt, or is not known, the rent director may, at any time initiate a proceeding proposing the issuance of an order pursuant to § 840.22.

§ 840.22 *Order upon determination of proceedings on report or application.* If in a proceeding instituted under § 840.21 it is determined that the report or application should be rejected, the rent director shall issue an appropriate order determining that the accommodations remain subject to control and establishing the maximum rent.

LANDLORD'S APPLICATION FOR REVIEW OF RENT DIRECTOR'S ACTION

§ 840.23 *Landlord's application for review.*
(a) Any landlord, except a landlord subject to an order issued pursuant to § 840.8 (c), whose petition for adjustment or other relief has been dismissed or denied in whole or in part by the rent director, or any landlord subject to an order entered by the rent director on his own initiative, may file with the rent director an application for review of such determination by the Regional Rent Administrator for the region in which the defense-rental area office is located; *Provided*, That any landlord subject to an order entered under section 5 (d) of any maximum rent regulation or subject to an order entered by the rent director under §§ 840.7, 840.16 or 840.22 may either apply for review of such order as provided in this section, or may appeal any provision of such order as provided in § 840.25 and following of this part. An application for review shall be filed in triplicate upon forms prescribed by the Housing Expediter and pursuant to instructions stated on such forms. Upon the filing of an application for review of such determination, the rent director shall forward the record of the proceedings, with respect to which such application is filed, to the appropriate Regional Rent Administrator.

(b) Applications for review may be filed within sixty (60) days after the date of issuance of the determination to be reviewed or

within thirty (30) days after the date of issuance of this part, whichever is later. An application for review which is not filed within the specified time ordinarily will be dismissed unless special circumstances are shown to justify a later filing. * * *

§ 840.24 *Action on applications for review.* Upon the filing of an application for review in accordance with § 840.23, and after due consideration of the record, the Regional Rent Administrator shall determine whether the action of the rent director is appropriately substantiated by the record and is otherwise in accordance with applicable law and regulations. Upon the basis of such consideration, the Regional Rent Administrator may, by appropriate order, affirm, revoke, or modify, in whole or in part, the determination of the rent director sought to be reviewed or may remand the proceedings to the rent director for further action not inconsistent with the determination of the Regional Rent Administrator. In any case where an application for review does not conform in a substantial respect to the requirements of this part, the Regional Rent Administrator may dismiss such application. An order entered by a Regional Rent Administrator upon an application for review shall be effective and binding until changed by further order and shall be final subject only to appeal as provided in § 840.25 and following of this part. An order entered by a Regional Rent Administrator upon an application for review may be revoked or modified at any time, *Provided, however*, Due notice of the intention so to revoke or modify was previously given to the applicant. * * *

SUBPART B—APPEALS TO THE HOUSING EXPEDITER

Introduction. Subpart B deals with “appeals” to the Housing Expediter. An appeal is the means provided for landlords to make

formal objections to a maximum rent regulation or order. The review by the Housing Expediter upon an appeal from an order of individual applicability will be limited to a determination of whether the action of the rent director is appropriately substantiated by the record and is otherwise in accordance with applicable law and regulations; and evidence not before the rent director will not be received from the person filing the appeal. However, upon consideration involving an appeal directed against a maximum rent regulation, the Housing Expediter will accord *de novo* consideration and will receive evidence and otherwise conduct the proceedings consistent with the provisions set forth below. The filing and determination of a proper appeal is ordinarily a prerequisite to obtaining judicial review of administrative determinations. At any time during the administrative consideration of an appeal directed solely to a regulation, the Administrator may refer the appeal to the rent director for the area from which the appeal arises and request such rent director to make recommendation with respect to the disposition of the appeal.

GENERAL PROVISIONS

§ 840.25 *Right to appeal.* (a) Any landlord subject to any provision of a maximum rent regulation, or of an order issued under § 840.24 (except an order remanding to the rent director), or of an order entered under section 5 (d) of any maximum rent regulation, or of an order entered by the rent director under §§ 840.7, 840.8 (c), 840.16 or 840.22, may file an appeal in the manner set forth below.

(b) A landlord is subject to a provision of a maximum rent regulation or of an order only if such provision prohibits or requires action by him.

(c) Any appeal filed by a landlord not subject to the provision appealed from, or otherwise not in accordance with the requirements of this part, may be dismissed by the Housing Expediter.

§ 840.26 *Time and place of filing appeals.*

(a) Any appeal against the provisions of a maximum rent regulation may be filed at any time after the issuance thereof.

(b) Ordinarily there will be no reason why an appeal from an order affecting only an individual and issued under § 840.24, or of an order entered under section 5 (d) of any maximum rent regulation, or of an order entered by a rent director under §§ 840.7, 840.8 (c), 840.16, or 840.22, cannot be filed promptly after the issuance of such order. Accordingly, if an appeal is not filed within sixty (60) days after the date of issuance of such order or within thirty (30) days after the issuance of this part, whichever is later, the Housing Expediter ordinarily will regard the delay as unreasonable and will dismiss the appeal unless special circumstances are shown to justify the delay.

(c) Appeals shall be filed with the Certifying Officer, Office of the Housing Expediter (formerly known as the Secretary, Office of Rent Control), Washington 25, D. C. A copy of the appeal shall also be filed with the appropriate Regional Rent Administrator or rent director as provided in § 840.28: *Provided, however,* That an appeal directed solely against a regulation shall be filed with the rent director of the area out of which the appeal arises and the rent director shall, within twenty (20) days of such filing transmit the appeal to the Housing Expediter. The rent director may also transmit such pertinent data and materials as are available. * * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA, LINCOLN DIVISION

No. 61-48 CIVIL

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, FOR AND IN BEHALF OF THE
UNITED STATES, PLAINTIFF

v.

ROBERT FEES AND MRS. ROBERT FEES, DEFENDANTS

MEMORANDUM

DELEHANT, D. J.: The plaintiff, in behalf of the United States, brings this action against the defendants under Section 206 (b) of the Housing and Rent Act of 1947, as amended (Title 50 App. U. S. C. A. Section 1881 et seq.), and in his complaint prays for an injunctive order against the violation by the defendants, as the owners of a designated housing accommodation in the city of Lincoln, Nebraska, of the Act or of the Controlled Housing Rent Regulation thereunder. The complaint is based on the defendants' alleged receipt of overceiling rentals from one Don Rieger, tenant of the accommodation, for the period from May 26, 1948, to September 10, 1948.

Answering, the defendants admit their status as landlords of the accommodation and Rieger's tenancy, and allege, (a) the making of major alterations after their initial registration of the accommodation under then current rent regulations, which, upon the trial they contended, effected its decontrol under the Housing and Rent Act of 1947, (b) their own good faith,

(c) the full understanding and concurrence of Rieger in the rental arrangement for the applicable period, and (d) the essential justice and fairness in the circumstances of the rental paid.

The action has been tried to the court without a jury; and in the trial, the issue principally drawn to the court's attention was whether the housing accommodation in question was decontrolled during the time set out in the complaint. The essential facts are not seriously in dispute. They will now be set out very briefly and without unnecessary detail.

The accommodation in question is located in the basement of the defendants' residence property, at 315 North 18th Street, Lincoln, Nebraska. On May 6, 1947, Mrs. Fees filed with the local Area Rent Office of the Office of Price Administration a registration of it as a basement sleeping room with shared bath room and toilet facilities (located not in the basement but on the first or main floor) and shared telephone service and laundry space, for which a rental rate of \$4.00 per week was then being charged, and was allowed and fixed by the rent office. The room which was eight feet by eleven feet in size was occupied at the time of its registration by two ladies who thereafter vacated it.

The defendants then and after February 1, 1947, and after the passage and approval of the Housing and Rent Act of 1947, and immediately before its leasing to Rieger, substantially rebuilt and enlarged the accommodation. Without itemizing all of the changes, it may be said that it was converted into an apartment with two bed rooms, a kitchen, a toilet, and a shower bath, all enclosed for private occupancy; whereas, before the alterations, only the single sleeping room was segregated for private occupancy and that by curtain only, and the laundry space was in

another part of the basement. Besides, the defendants furnished the new apartment and it was rented as a furnished apartment. The cost of the changes was somewhere between \$300.00 and \$500.00.

When the remodeling was almost completed the defendants rented the altered accommodation to Don Rieger for \$40.00 per month; and Rieger, his wife, and a male roomer, occupied the apartment from May 26, 1948, to September 10, 1948, and over that period Don Rieger paid rent for it at the rate of \$40.00 per month.

During that tenancy the defendants neither obtained an approval of an increase in the rental for the altered accommodation nor made any application therefor. However, on October 21, 1948, Mrs. Fees filed with the Lincoln Rental Area Office of the Office of Housing Expediter a landlord's petition for the adjustment of rent for the accommodation, designating \$40.00 as the then current monthly rent for it, fully furnished; and after inspection, the Lincoln Area Rent Director, on October 21, 1948, increased the allowable rent from \$4.00 per week to \$7.00 per week for occupancy by one or two persons, and \$8.50 per week for occupancy by three or more persons.

The question first and chiefly encountered is whether the alterations effected the decontrol of the accommodation, with the consequence of removing its amenability to regulation. That question has to be answered negatively. Before the improvements the accommodation was a single housing unit. Thereafter, though substantially enlarged and improved, it was still a single housing unit. It was much larger in floor space and number of rooms and superior in furnished facilities and equipment. Nevertheless it was residential space for only one social or family unit, though it could easily include more members

than might comfortably have been sheltered in the sleeping room.

By section 202 (c) of the Act it is provided, inter alia, that, "The term 'Controlled Housing Accommodations' means housing accommodations in any defense-rental area, *except that it does not include:*

* * * * *

(3) *any housing accommodations which are additional accommodations created by conversion on or after February 1, 1947.*" [Italics added].

This language has undergone formal interpretation by the Authority charged with the enforcement of the Act (see 13 F. R. 5001 et seq.) in the following language:

In determining whether additional housing accommodations have been created, the primary test is not whether there are more tenants in occupancy than before the conversion, nor whether there is more floor space. The determination is made by comparing the number of dwelling units before and after the conversion.

The court recognizes that an administrator's interpretation of a legislative act with whose enforcement he is charged is entitled to less weight than his interpretation of the meaning of one of his own regulations, which has authoritatively been held to the "ultimate criterion" of such meaning, *Bowles v. Seminole Rock Co.*, 325 U. S. 410. But, by the great weight pertinent authority, the cited administrative interpretation, though not controlling upon the court, is entitled to substantial regard in the judicial consideration of specific cases to which it has application, and unless it is plainly erroneous or inconsistent with the Act it constitutes a service to which the

court may have resort in appraising the meaning of the Act. *Mabee v. White Plains Publishing Co.*, 327 U. S. 178; *Skidmore v. Swift & Co.*, 323 U. S. 134; *Bridgeman v. Ford Bacon & Davis* (D. C. Ark), 63 F. Supp. 733; *Abram v. San Joaquin Cotton Oil Co.* (D. C. Cal.), 46 F. Supp. 969. And no such error or inconsistency is perceived in the quoted appraisal of the applicable section of the Act. On the contrary, the interpretation of the Expediter is in harmony with the purpose of the Act, high among which is the substantial increase in the number of available housing units, *Woods v. MacNeil Bros. Co.*, (D. C. Mass), 80 F. Supp. 920.

To the well grounded suggestion that the rental value of the accommodation has been greatly enlarged at substantial cost to the defendants, it is sufficient to observe that Section 5 (a) (1) and (3) of the Housing and Rent Regulation under the Act, has made adequate provision for the granting of increases in rentals under such conditions. And resort has actually been had to it by the defendants.

That brings the court to a second reflection. The defendants by seeking and obtaining, though somewhat tardily and in slightly smaller measure than they desired, an adjustment upward of their rental have themselves cast doubt upon the validity of their contention that the space is freed from control. Undoubtedly, the court should not appraise a mistaken resort to the facilities for increase in the allowable rentals for controlled housing accommodations, as a waiver of a well grounded contention for decontrol. But there is no mistake here; merely a recognition, however reluctant, of the accommodation's controlled status.

The other considerations urged by the defendants, including their good faith in the premises, the ready

and unreserved concurrence by Rieger in the rental arrangement, and the objective fairness of the amount of the rental for the remodeled accommodation, if the effective maximum rental order in respect of it be disregarded are factually true. But in considering whether an injunction against future violation should be granted they are inoperative to nullify or excuse the violation of the act and regulation. *The Hecht Co. v. Bowles*, 321 U. S. 321; *Henderson v. Baldwin* (D. C. Pa.), 54 F. Supp. 438; *Brown v. W. R. McNeil, Inc.* (D. C. Wis.), 52 F. Supp. 485. Control in the pricing field, including housing rentals, would be completely paralyzed, if even in good faith but in disregard of the administratively determined price the receiver and the payer could agree without restraint upon a different consideration, however equitable it might individually be.

The violation alleged in the collection of rent from Rieger, thus, stands proved. To the suggestion that an injunctive order should not be made, because the defendants have now obtained and presumably will observe a new maximum price order, it has to be answered that the position of the defendants in this case forbids such a conclusion. Despite their fruitful resort to the Area Rent Office, they still contend that the accommodation is decontrolled, and, therefore, beyond the jurisdiction of that office, and, for that matter, of the Expediter and the court. The injunction should, therefore, be granted.

However, the plaintiff also demands that the order require the defendants to return to Rieger the amount by which the rentals he paid exceed the rental for the period of his occupancy at the prescribed maximum rate of \$4.00 per week. That the court, in the exercise of its discretion as a court of equity, refuses

to do; in furtherance of which refusal the prayer of the complaint is denied to that extent.

In the latter course, the court fully recognizes the rule declared in *Porter v. Warner Holding Co.*, 328 U. S. 395, and the many subsequent cases which followed it. No doubt exists that this court has the power to make an order for restitution. But, whether such an order "be considered as an equitable adjunct to an injunction decree" or "an order appropriate and necessary to enforce compliance with the Act," (see 328 U. S. at pp. 399 and 400), it should spring in any event from equitable considerations.

And in the factual framework of this particular case, an order, ostensibly requiring restitution, would confer on Rieger a manifest windfall and constitute a perversion, rather than a legitimate exercise, of the court's power to compel the doing of equity. It is one thing to recognize, in the course of administering the Housing and Rent Act of 1947 that, claiming decontrol, the defendants, in failing to seek a timely increase in rental for their vastly enlarged, altered and improved housing accommodation, and in collecting, meanwhile, a rent beyond the earlier determined maximum prescription, violated the Act and its regulation and subjected themselves to liability for an injunctive order against further violation. It is quite another thing to compel them to repay approximately sixty percent of the rental they received to the man who enjoyed for himself, his wife and a roomer the hospitality of that housing facility and paid for it only a fair and reasonable sum per month which he was perfectly willing to pay. The court is fortified in its view of the reasonableness of the rent charged by the circumstances that the local rent control office eventually fixed \$8.50 per week as the allowed rental for the occupancy of the premises by three persons. That means about \$36.50 or \$37.50 per month. And Rieger

paid \$40.00 per month. What he paid was not disproportionate to, but rather eminently fair for, what he received. It would be sheer oppression of the defendants to compel them to return its larger part. And Rieger might well point in exultant derision to a court which would stultify itself by awarding such an underserved gratuity—and that under the guise of equity.

What has clearly to be kept in view is, that from the standpoint of the general enforcement of the Act by injunction, the housing accommodation involved is still controlled and the court must determine its maximum rentals from time to time according to the area rent director's operative orders; but that as between the defendants and Rieger the housing unit he occupied was only technically, not realistically, the unit for which the director at one time prescribed a \$4.00 weekly rental. And the latter reflection enters vitally into the equity of the restitution order for which the plaintiff inequitably prays.

Dated: June 2, 1949.

Filed District of Nebraska at 4:00 p. m., #15,
June 2, 1949.

MARY A. MULLEN,
Clerk.

By EBP, *Deputy.*

A true copy.

Attest: [SEAL] MARY A. MULLEN,
Clerk.

By (S) E. P. PANTER,
Deputy.

United States District Court for the Northern District
of New York

Civil Action, File No. 3173

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, PLAINTIFF

v.

STELLA RETTAS AND GEORGE RETTAS, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having duly come on for trial before this Court without a jury on February 24, 1949, plaintiff having appeared by Sylvan D. Freeman, J. S. Brounstein, of counsel; and defendant having appeared by Spira & Hershkowitz, Max H. Hershkowitz, of counsel, and after hearing testimony of witnesses and argument of counsel, and upon all the pleadings and proceedings in the cause and full consideration thereof, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff is the duly appointed Housing Expediter, Office of the Housing Expediter.

2. Defendants, George and Stella Rettas, at all times pertinent hereto were landlords and operators of housing accommodations located at premises 1122 24 Sixth Avenue, Schenectady, New York.

3. That the 2nd floor apartment at said premises, was at all times pertinent hereto, subject to the Housing & Rent Act of 1947, as amended and the Controlled Housing Regulation issued thereunder.

4. Prior to March 18, 1948, the maximum legal rent for the 2nd floor apartment was \$25.00 per month, as indicated in a registration statement filed in the Area Rent Office.

5. In about November 1947, defendants converted the premises from a 2 family to a 3 family house, completely modernized the 2nd floor apartment by the installation of new plumbing, fixtures, and cabinets. In the course of such alteration, a stairway leading to the 3rd floor attic was enlarged for access thereto and a new apartment was created on the 3rd floor.

6. Defendants' application to the Office of the Housing Expediter for an increase in the maximum legal rent of the 2nd floor apartment resulted in an order permitting an increase to \$70.00, including heating fuel, per month, effective March 18, 1948.

7. Stephen Jason was a tenant occupying the 2nd floor apartment from December 7, 1947, to March 15, 1948, and paid the defendants the sum of \$25.00 per week during that period except that no rent was paid for the last 3 weeks thereof.

8. Tenant Roy E. Burris, Jr., occupied the 2nd floor apartment from April 1, 1948, to November 30, 1948, and paid the defendants \$80.00 per month for that period plus a total of \$57.88 for fuel oil.

9. Section 202 (c) (3) of the Housing & Rent Act of 1947 and Section 1 (b) (2) of the Regulation provide that additional housing accommodations created by conversion on or after February 1, 1947, may be decontrolled.

10. An official interpretation of these sections issued by Ed Dupree, General Counsel of the Office of the Housing Expediter on August 25, 1948, and published in the Federal Register holds that the decontrol determination is made with respect to the dwelling units

which are necessarily involved in the creation of additional housing accommodations.

11. The 2nd floor apartment is not "additional housing accommodations created by conversion" as contemplated by the Act and Regulation thereunder.

12. Since the two tenants involved had the benefit of the modernization, on which the March 18, 1948, order of the Area Rent Director, increasing the maximum legal rent to \$70.00, was based, equity requires that that rental be used as the basis for computing overcharges.

13. The tenant Stephen Jason has been overcharged the sum of \$18.66.

14. The tenant Roy E. Burris has been overcharged the sum of \$137.88.

15. The defendants have charged rentals in excess of the legal maximum rent and because of this claim that the 2nd floor apartment is decontrolled, will continue to so overcharge unless restrained.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter of this action.

2. The 2nd floor apartment of the premises is not removed from rent control by the provisions of Section 202 (c) (3) of the Housing and Rent Act of 1947 as amended.

3. Plaintiff is entitled to an order requiring defendant to refund \$18.66 to Stephen Jason and \$137.88 to Roy E. Burris.

4. Plaintiff is entitled to a permanent injunction against the defendants as prayed for in the complaint.

Dated: Utica, New York, March 25, 1949.

(S) STEPHEN W. BRENNEN,
U. S. D. J.

In the District Court of the United States for the
Eastern District of Michigan, Southern Division

Civil Action No. 7977

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, PLAINTIFF

v.

HARRY L. ANDERSON, 3967 ST. CLAIR STREET, DETROIT,
MICHIGAN, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

This cause came on for hearing on the Complaint filed by the plaintiff, Answer of defendant and other pleadings, statements of counsel and evidence submitted to the Court. Upon consideration thereof the Court finds specially that:

1. Plaintiff filed the above action as Housing Expediter under the provisions of the Housing and Rent Act of 1947, as amended, seeking restitution to the tenants, or in the alternative to the United States, and a final injunction, restraining violation of the Housing and Rent Act of 1947, as amended, by the defendant.

2. The defendant, Harry L. Anderson, is the owner, landlord, and operator of the housing accommodations located at 2524-26 Pennsylvania, Detroit, Michigan, within the Detroit Defense-Rental Area.

3. Counsel for defendant stipulated in open Court that providing the housing accommodations involved herein are subject to control, the rental units, the

names of the tenants, the periods of occupancy, the maximum legal rents, and the rents received by the defendant, all as set forth in Schedule "A" attached to plaintiff's Complaint are correct.

4. The sole issue raised by the defendant in this case was that under Section 202 (c) (3) of the Housing and Rent Act of 1947, as amended, the defendant had created additional housing accommodations by conversion after February 1, 1947, and the housing accommodations involved herein were decontrolled.

5. The Controlled Housing Rent Regulation defines conversion as "(2) a structural change in a residential unit. * * * involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations."

6. In Interpretation 2 of Section 1 (b) 2, issued August 25, 1948, paragraph v-4 applies the requirement that for decontrol in this respect there must be a structural change involving substantial alterations or remodeling. Section 5 requires that where there has been a structural change involving substantial alterations or remodeling, decontrol occurs only if additional housing accommodations result from this work. Section 6 requires that in determining whether additional housing accommodations have been created, the primary test is not whether there are more tenants in occupancy than before the conversion. The determination is made by comparing the number of dwelling units before and after the conversion.

7. On November 25, 1947, the defendant purchased the premises consisting of four unfurnished five-room dwelling accommodations, each containing a living room, dining room, two bedrooms, kitchen, and bathroom, and each occupied by one family.

8. These four families vacated the premises on and after December 18, 1947, and the defendant then painted and decorated the premises, placed a Frigidaire and stove in each of the four kitchens, installed furnaces, hot water tanks, gutters, a wiring system, and put locks on the doors. Some janitor service and some furnishings were provided.

9. The defendant then rented each of the identical five-room units to two families, one family occupying the living room and dining room and the other family occupying the two bedrooms, both families sharing the kitchen and bathroom.

10. No structural changes were made and no additional housing accommodations were created. The services and equipment furnished and the painting and decorating performed by the defendant do not constitute a conversion. On the contrary there resulted a restriction in the housing accommodations in that where formerly one family had the use of the kitchen and bathroom, after the change in rental plan, two families shared the kitchen and bathroom.

11. The claim of overcharges as to tenant, Joseph Johnson, was withdrawn from consideration in this case, on the ground that this tenant filed an independent action against the defendant herein to recover such overcharges.

12. From January 30, 1948, to October 7, 1948, said defendant demanded and received from Clyde Haines, rents in excess of the maximum legal rents for the use and occupancy of the upper south front rooms of said housing accommodations in the sum of \$378.00.

13. From March 1, 1948, to September 11, 1948, said defendant demanded and received from S. K. Haines for the use and occupancy of the upper north front rooms of said housing accommodations, rents

in excess of the maximum legal rent in the sum of \$286.00.

14. From September 11, 1948, to December 11, 1948, said defendant demanded and received from Barbara Means for the use and occupancy of the upper north front rooms of said housing accommodations, rents in excess of the maximum legal rent in the sum of \$123.50.

15. From December 18, 1948, to February 5, 1949, said defendant demanded and received from James Haguely for the use and occupancy of the upper north front rooms, and from March 27, 1948, to December 18, 1948, for the use and occupancy of the upper north rear rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of \$368.50.

16. From January 6, 1948, to February 3, 1949, said defendant demanded and received from W. Hawkins for the use and occupancy of the lower north front rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of \$560.00.

17. From January 7, 1948, to February 3, 1949, said defendant demanded and received from C. Arnold for the use and occupancy of the lower north rear rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of \$465.00.

18. From January 1, 1948, to February 3, 1949, said defendant demanded and received from Theo. Wimberly for the use and occupancy of the lower south front rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of \$475.00.

19. From January 1, 1948, to February 5, 1949, said defendant demanded and received from Alma

No. 12,234

IN THE

United States
Court of Appeals

For the Ninth Circuit

TIGHE E. WOODS, Housing Expediter,
Office of the Housing Expediter,
Appellant,

vs.

MRS. DOROTHY WARD GINOCCHIO,
Appellee.

APPELLEE'S BRIEF

Appeal From the United States District Court
for the District of Nevada.

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FILED

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PAUL P. O'BRIEN,
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IN THE
**United States
Court of Appeals**
For the Ninth Circuit

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter, <i>Appellant,</i>	}
vs.	
MRS. DOROTHY WARD GINOCCHIO, <i>Appellee.</i>	

APPELLEE'S BRIEF

Appeal From the United States District Court
for the District of Nevada.

STATEMENT OF FACTS

The statement of the facts as presented in Appellant's Brief is not controverted, but will be augmented in certain particulars in connection with the argument hereinafter presented.

ARGUMENT**I.****The Court Below Did Not Err in Concluding as Matter of Law That the Leased Housing Accommodation Did Not Constitute a Controlled Housing Accommodation Under the Act.**

The housing accommodation leased by instrument dated July 30, 1947 (Exhibit K) (R. 110); and shown on the blueprints Exhibits I and J, differed from the housing accommodations, as shown on the blueprint Exhibit H, as the same existed prior to December 15, 1946 (R. 97), in the following particulars:

(a) The entrance to the structure was changed as to location (R. 84).

(b) The reception hall and closet were previously non-existent (R. 84).

(c) The southeasterly bedroom was formerly a dinette and the closets in the bedroom were previously non-existent (R. 84).

(d) The bedroom lying easterly of the dining room (Exhibit I), was previously a kitchen and nook (R. 84).

(e) The bathroom opening off the bedroom just mentioned was previously a porch or patio (R. 84, 85).

(f) The dining room was formerly a bedroom (R. 85).

(g) The closet space off the dining room was formerly a stairway to the basement (R. 85).

(h) North from the dining room is a hallway that did not exist previously (R. 85).

(i) The northwesterly bedroom was formerly a living room (R. 85).

(j) The kitchen was formerly a breakfast nook and kitchen (R. 85). The kitchen fixtures are new and in new locations (R. 100).

(k) The breakfast room occupies space that was in part a screen porch and in part newly added area (R. 86).

(l) The basement bedroom did not previously exist (R. 86).

(m) The house is equipped with a single central heating plant (R. 86). Previously there were two floor furnaces (R. 91).

(n) Of the five bedrooms on the main floor only the northerly two were previously in existence (R. 86).

(o) The bath opening off the hallway between the dining room and the kitchen is of different shape and arrangement and contains entirely new fixtures (R. 99, 100).

(p) Those portions of the exterior walls and the interior partitions that are shaded as shown on Exhibit I are new construction and did not previously exist (R. 92).

The Area Rent Director, on his own motion, on December 12, 1947, fixed the rental for the leased housing accommodation at the sum of \$180.00 per month (Exhibit 2). The rental for that portion of the housing accommodation previously rented had, by the Area Rent Director, previously on November 8, 1946, been fixed at \$57.50 per month (Exhibit 5), which, in itself, conclusively indicates that the Area Rent Director considered that the housing accommodation covered by the lease agreement was in fact

not the same housing accommodation that defendant had previously rented.

Section 1(b)(8)(i) of Controlled Housing Rent Regulation (12 F.R. 4331) (Appellant's Brief p. 54) provides:

"For the purposes of this Paragraph (8) the construction of housing accommodation is considered completed on the date the last material, fixture or equipment is incorporated into the structure, provided the dwelling is suitable for occupancy at that time."

The defendant contends that the construction of the housing accommodation described in the lease agreement (Exhibit K), that is the building or structure leased, was completed after February 1, 1947.

The Court below so concluded (R. 22). The conclusion is supported by the evidence presented to the Court below, portions of which are hereinabove referred to and concerning which there is practically no dispute.

This case is to be distinguished from that of *Elma Realty Co. v. Woods*, 169 F.2d 172, where the building involved was rendered untenable by reason of fire and the Court found that the landlord had simply restored the old apartments.

Rather the present case is to be compared to that of *Delsnider v. Gould*, 154 F.2d 844, where at pages 847 and 848 the Court said:

"The question whether the housing accommodations involved are new ones not rented on the critical date, or are old ones with substantial capital improvements or alterations, is a question of fact, which, in an action such as that at bar, must, unless the evidence is compelling one way or the other, be decided by the jury. The answer may be elusive and

the line difficult to determine in some cases; but there is a line. If, on January 1, 1941, there were on a given lot a one-story frame shack, and thereafter the owner tore down the shack and built a new, two-story, brick dwelling with completely modern equipment, there could be no doubt that the latter housing accommodations were new. If, on the other hand, a dwelling were rented on the critical date and thereafter the landlord moved a partition, or, as in *Gilbert v. Thierry*, merely installed a mechanical refrigerator, the resulting accommodation is not new but is the old with improvements or alterations. Between these two extremes is a difference which grows less clear as the borderline is approached. By analogy, it is not unlike the line between repairs and capital improvements with which business men and accountants are almost daily concerned and with which the courts must frequently deal.

In the present case, we think only one conclusion possible. The evidence is vivid and compelling. The completely equipped and furnished house rented to these appellees was a new housing accommodation not theretofore rented. A contrary conclusion, that this combination of house, facilities, equipment and furnishings, fairly worth \$85.00 a month by the Administrator's finding, was the same as the 'shack in a terrible condition' rented at these premises on January 1, 1941, for \$15.50 a month, could not have been sustained."

There is no dispute in the case at bar relating to the facts. From the facts the Court below concluded that no violation of any statute had occurred. Whether there was or was not such a violation becomes a legal question and not a question of fact. *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94.

II.

The Court Below Did Not Err in Permitting the Defendant to Establish as Matter of Defense That the Housing Accommodation Was Not a Controlled Housing Accommodation.

The complaint filed by the Housing Expediter (R. 2) was filed under Section 206(b) of the 1947 Act (Appellant's Brief p. 53).

Before the complaint can be sustained it must appear that the housing accommodation constituting the subject matter of the complaint was a "controlled housing accommodation" within the meaning of the 1947 Act, for by Section 206(a) of the Act (Infra App. A) it is only the receiving of rent in excess of the maximum prescribed by Section 204 for the use and occupancy of a *controlled housing accommodation* that is made unlawful.

Section 204(d) of the 1947 Act (Infra page 7) authorizes the Housing Expediter to issue such regulations as may be necessary to carry out the provisions of Section 204 and Section 202(c).

Section 210 of the 1947 Act (Infra App. A) makes the Administrative Procedure Act inapplicable to the Housing and Rent Act of 1947.

The Act of 1947, prior to amendment in 1948, made no provision for review of orders by the Housing Expediter or for review of orders made pursuant to regulation or rule of the Housing Expediter. Likewise nothing contained in the Act of 1947 purports to give any degree of finality to any order of the Housing Expediter or to any order made pursuant to regulation or rule of the Housing Expediter.

A. THE 1947 RENT ACT DOES NOT PROVIDE THAT THE DECISION OF ANY BOARD, OFFICER OR COURT SHALL BE FINAL.

In

LaVerne Co-Op Citrus Assn. v. United States, 143
F.2d 415-416;

And in

Myers v. Bethlehem Shipbuilding Corporation, 303
U.S. 41, 50;

And in

Yakus v. United States, 321 U.S. 414, 429;

And in

Macauley v. Waterman Steamship Corp., 327 U.S.
540, 544;

And in

United States v. Ruzicka, 329 U.S. 287, 291.

The Congress had by express legislative act made the administrative procedure prescribed in the act final. Each of the cases is authority for the rule that the Congress has the power to vest exclusive jurisdiction in the particular Board or Court designated.

The cases arising under the provisions of the Emergency Price Control Act of 1942 are not authority that may be relied on determining cases arising under the Rent Control Act of 1947, for by the express provisions of Section 204(d) of the 1942 Act it was provided:

“The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued * * *.”

The Court in the case of *Koster v. Turchi*, 173 F.2d 605, held that a tenant must apply in accordance with the prescribed procedure for a reduction in rent before seeking equitable relief in the courts from an order increasing applicable maximum rentals. This holding is in strict accord with the first proviso in Section 204(b) of the 1947 Act.

“* * * Provided, however, that the Housing Expediter shall, by regulation or order, make such adjustments in such maximum rents as may be necessary to correct inequities or further carry out the purposes of this title.”

The authority to fix maximum rents is clearly vested in the Housing Expediter by the Act.

B. THE HOUSING EXPEDITER MAY NOT HAVE EXCLUSIVE POWER TO DETERMINE HIS OWN JURISDICTION.

An administrative body may not have exclusive power to determine its own jurisdiction, an act may confer upon such a body exclusive initial power to make an investigation and then provide for a judicial review that is exclusive.

Newport News S. & Dry Dock Co. v. Schauffler, 303 U.S. 54, 57.

To the same effect is the case of *Crowell v. Benson*, 285 U.S. 22, where the court permitted the complainant to present facts showing that the case lay outside the purview of the statute and in so doing said (p. 65):

“It cannot be regarded as an impairment of the intended efficiency of an administrative agency that it is confined to its proper sphere * * *.”

In *Social Security Board v. Nierotko*, 327 U.S. 358, the Court said (p. 369):

“An agency may not finally decide the limits of its statutory power. That is a judicial function.”

C. THE HOUSING EXPEDITER MAY NOT BY REGULATION ENLARGE THE SPHERE OF THE ACT.

The Housing Expediter is not authorized by the Act to prescribe any rule or regulation concerning any housing accommodations that are not subject to the Act of 1947. However, by rule or regulation the Housing Expediter did endeavor to enlarge the scope of the statutory definition of controlled housing accommodations as prescribed by Congress in Section 202(c) of the 1947 Act, by providing in Section 1(b)(8) of “Controlled Housing Rent Regulations under the Housing and Rent Act of 1947” (12 F.R. 4331) (Appellant’s Brief p. 54) that the regulations, and therefore the 1947 Act, shall apply to housing accommodations the construction of which was completed after February 1, 1947, unless, and until, the landlord shall file a “Report of Decontrol” on a form provided by the Expediter and within a specified period of time.

Where the definition promulgated by an administrative body is beyond the scope of the Act the entire regulation or definition must fall.

Addison v. Holly Hill Fruit Products, 322 U.S. 607.

A regulation promulgated by an administrative body to be valid must be consistent with law.

International Railway Co. v. Davidson, 257 U.S. 506, 514.

Such a regulation may not extend a statute or modify its provisions.

Campbell v. Galeno Chemical Co., 281 U.S. 599, 610.

If, as in the case at bar, the regulation be not consistent with law and if, as in the case at bar, Congress has provided no exclusive review procedure but has specifically recognized the applicability of judicial review by statutory provision, it must be deduced that Congress did intend that the courts designated could consider whether or not a regulation or an order of the administrative body is consistent with the applicable law.

D. COURT REVIEW IS CONTEMPLATED BY ACT.

Section 206(b) of the 1947 Act provides:

“Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.”

Section 206(b) of the 1947 Act provides that the Housing Expediter must show in the contemplated action that the defendant has engaged or is about to engage in a prohibited act or practice. This proviso must likewise authorize the defendant to show that he did not engage

in a prohibited act or practice. The Housing Expediter must therefore show to the court that the defendant's housing accommodation and the language of the statute will not preclude the defendant from showing that her housing accommodation was not a controlled accommodation within the definition of the statute and the regulation cannot increase the scope of the statute.

The case at bar is similar to that of *Stark v. Wickard*, 321 U.S. 288, where the court said (pp. 309, 310):

“When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted * * *. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction.”

To the same effect is *Estep v. United States*, 327 U.S. 114, 121;

United States v. George, 228 U.S. 14;

Teal v. Felton, 12 Howard 284; and

Miller v. United States, 294 U.S. 435. Rehearing denied, 294 U.S. 734.

The case of *Gates v. Woods*, 169 F.2d 440, was decided by the Circuit Court of Appeals, Fourth Circuit, under the 1947 Act and the regulations promulgated by the Housing Expediter. The Court relied for authority on *Black River Valley Broadcasters, Inc. v. McNinch*, 101 F.2d 235, in which case a statute was involved that provided a specific administrative procedure with an appeal to a designated court. It is repeated that in the case at bar and in the *Gates* case the Act does not prescribe any administrative remedy or any judicial appeal to any specific court to the exclusion of all others, but does contemplate enforcement actions and requires a showing by the Housing Expediter. It is submitted that the *Gates* case should not be followed in the case at bar.

Where it appears that there is a violation of a person's legal rights under an applicable statute, there is no longer any occasion for the requirement that he exhaust his administrative remedies before seeking to vindicate his rights in Court.

Wettre v. Hague, 168 F.2d 825;

Clinkenbeard v. United States, 88 U.S. 65;

American School of Magnetic Healing v. McAnnulty, 187 U.S. 94.

In *Woods v. Western Holding Corporation*, 173 F.2d 655, the action was, like the one at bar, brought to enjoin the defendant from collecting and charging over-ceiling rents. The action was also to prevent the eviction of tenants. By answer, the defendant alleged that the property in question was not subject to control because of the adoption of Section 202(c) of the 1947 Act. The court held

the premises to be excluded from control under the section. It does not appear from the decision whether any proceeding for decontrol had been taken by the defendant prior to the suit.

III.

The Defendant Did Pursue and Exhaust Her Administrative Remedy.

Rent Procedural Regulation 1 (12 F.R. 5619) provides for an order upon determination of proceedings on report or application for decontrol in Section 840.22, which section provides as follows:

“If in a proceeding instituted under Section 840.21 it is determined that the report or application should be rejected, the rent director shall issue an appropriate order determining that the accommodations remain subject to control and establishing the maximum rent.”

Section 840.23(a) deals with Landlord's Application for Review of Rent Director's action and provides in part as follows:

“Any landlord, except a landlord subject to an order issued pursuant to Sec. 840.8(c), whose petition for adjustment or other relief has been dismissed or denies in whole or in part by the rent director, or any landlord subject to an order entered by the rent director on his own initiative, may file with the rent director an application for review of such determination by the Regional Rent Administrator for the region in which the defense-rental area office is located: Provided, that any landlord subject to an order entered under section 5(d) of any maximum rent regulation or subject to an order entered by the rent director under sections 840.7, 840.16 or 840.22 may either apply for review of such order as pro-

vided in this section, or may appeal any provision of such order as provided in section 840.25 and following of this part. An application for review shall be filed in triplicate upon forms prescribed by the Housing Expediter and pursuant to instructions stated on such forms. Upon the filing of an application for review of such determination, the rent director shall forward the record of the proceedings, with respect to which such application is filed, to the appropriate Regional Rent Administrator."

This section provides that the landlord may apply for review to the Regional Rent Administrator or to the Housing Expediter. It does not provide that both remedies may be pursued.

Mr. Richards addressed a communication to Ward Cox, the Regional Administrator, on December 20, 1947 (R. 44-45). The letter was not in the prescribed form for an appeal and was mailed after the expiration of the time for appeal specified in the Regulation. Nevertheless, the Regional Administrator did accept the letter and did state that he had insufficient facts "to be able to determine whether or not the action of the area rent office was correct" and stated further that he was writing the area office for a report (R. 39-40).

On January 2, 1948, the Regional Rent Administrator did determine that the action of the Area Rent Office was correct (R. 44). The appeal may have been late and not in proper form, but it was accepted and a determination was made.

While the provisions of the Rent Procedural Regulation 1 (12 F.R. 5619), may have permitted a further appeal the final statement in the letter of Ward Cox, dated February

10, 1948 (R. 44), reading: "As suit has now been filed, decision in this case rests with the Court," would certainly halt any further pursuit of any administrative remedy by the defendant.

IV.

Conclusion

Whether it be determined that the defendant did pursue her administrative remedy by an appeal to the Regional Rent Director, which appeal was accepted and determined, or whether it be determined that the Housing Expediter may not enlarge the sphere of the Act by regulation and may not be the sole judge of his jurisdiction, and that the Act contemplates that jurisdictional facts must be established in a suit under section 206(b), it is submitted that the decree of the court below should be sustained.

Respectfully submitted,

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Attorney for Appellee

(Appendix follows)

APPENDIX A

Pertinent provisions of the Housing and Rent Act of 1947 (50 U.S.C. App., Secs. 1881 et seq.):

Section 204(d):

The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202(c).

Section 206(a):

It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204.

Section 210:

Section 2(a) of the Administrative Procedure Act, as amended, is amended by inserting after "Selective Training and Service Act of 1940;" the following: "Housing and Rent Act of 1947;"

No. 12234

**In the United States Court of Appeals
for the Ninth Circuit**

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT**

v.

MRS. DOROTHY WARD GINOCCHIO, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEVADA**

APPELLANT'S REPLY BRIEF

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FILED

DEC 31 1949

PAUL P. O'BRIEN,

CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 12234

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLANT

v.

MRS. DOROTHY WARD GINOCCHIO, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEVADA*

APPELLANT'S REPLY BRIEF

STATEMENT

Appellee has submitted a brief which offers no comment upon the undisputed fact that where there were two complete dwelling units before alteration of the duplex structure, only one dwelling unit existed after the structural changes (R. 79). The brief devotes but brief consideration to the substantial question whether as a result of the alterations such single dwelling unit constituted "additional housing accommodations created by conversion" within the meaning of the Act and Regulation (Appellant's brief, p. 3). The contentions which are advanced by appellee will be considered in the order appearing in her brief,

and will be discussed only to the extent that they are not covered in appellant's original brief.

ARGUMENT

I

Alterations of the duplex structure did not constitute additional housing accommodations within the meaning of the Act and Regulation

Pages 2 and 3 of the brief set forth various aspects in which the altered single dwelling unit differed from the former duplex structure. But as pointed out in the brief for appellant (p. 40), these structural changes resulting in the creation of additional floor space did not constitute additional housing accommodations. Whereas there were two dwelling units prior to the alterations, only one dwelling unit existed thereafter (R. 79).

As pointed out in the brief for appellant (pp. 36, 37), under the official interpretation of the Housing Expediter, the basis for determining whether additional housing accommodations were created is not whether there are more tenants or more floor space than before the alterations but "The determination is made by comparing the number of dwelling units before and after the conversion." The fact that two bedrooms on the ground floor and one bedroom in the basement were added, did not constitute additional housing accommodations (Appellant's brief, p. 42). The entire altered structure, and not the separate rooms therein existing after the alterations, constituted the housing accommodations involved, which were the subject of the Area Rent Director's order

rejecting decontrol (R. 115, Appellant's brief, p. 35).

The statement at page 3 of the brief that of the five bedrooms on the main floor, only the northerly two were in existence prior to the alterations is incorrect. As the appellant's brief points out (pp. 41-42), the northern or rear duplex unit consisted of two bedrooms and the southern or front unit consisted of one bedroom, making three bedrooms in the structure prior to the alterations so that only two additional bedrooms on the main floor were added (Defendant's Exhibits "H" and "I", R. 88, 89).

Page 3 of the brief refers to the action of the Rent Director in fixing the rental of the altered housing accommodation at \$180 per month when a rental of \$57.50 per month for one of the duplex units had previously existed and it is contended that by such procedure the Director considered the altered housing accommodations as not the same housing accommodations that the defendant had previously rented. Such fact is wholly immaterial. It is quite true that the single structure existing after the alterations was different from the two previous dwelling units. But the issue here is not whether *different* accommodations resulted from the structural changes, but solely whether *additional* housing accommodations were created as to entitle appellee to decontrol.

Here there was a decrease rather than increase in the number of dwelling units. For *different*, improved accommodations, other relief is provided, as for example adjustment of rent based upon Section 5 (a) (1) and Section 5 (a) (3) of the Rent Regula-

tion by reason of a major capital improvement of the housing accommodations and substantial increase in space, services, furniture, or equipment (Appellant's brief, pp. 8, 11). Appellee had already obtained the benefits of these adjustments which were authorized, but sought the further benefits of a complete exemption from the Act for which she was not qualified and which were not authorized.

Delsnider v. Gould, 154 F. 2d 844 (Brief pp. 4-5), has no application. That case arose under the District of Columbia Emergency Rent Act and not under the Housing and Rent Act of 1947 upon which the present action is predicated. It did not involve a question of decontrol but of adjustment. In such case where there were substantial improvement and alterations to a dwelling unit the Court recognized that the Administrator might adjust the rent ceiling " 'in such manner or amount as he deems proper to compensate' for the improvement or alteration, limited to a maximum equal to the rent generally prevailing for comparable accommodations" (154 F. 2d, p. 847). As shown above, in adjusting the rent of the altered duplex unit in the present case at \$180 per month the Area Rent Director entered an order of such character under Section 5 (a) (1) and Section 5 (a) (3) of the Rent Regulation under the Housing and Rent Act. The cited case, therefore, in no respect supports the contention that an alteration of housing accommodations which does not create additional housing accommodations, entitles the landlord to the decontrol exemption of the Act.

II

In the absence of exhausting administrative remedies appellee was precluded from contesting the validity of the Rent Director's order holding the single dwelling unit to be a controlled housing accommodation

In pages 6 to 12 of the brief under various topical designations, appellee contends that the Court below did not err in permitting her to offer the defense that the altered structure was not a controlled housing accommodation. In support of this contention, at page 6 of the brief, appellee argues that the Housing and Rent Act of 1947 made no provision for review of orders by the Housing Expediter, and that nothing in the Act gives any degree of finality to any of the Expediter's orders. The latter contention may be disposed of briefly since there is no contention by the Expediter that his orders may not be subject to judicial review. The Expediter concedes that the Courts may review such orders but only after the exhaustion of administrative remedies which have been provided in the Procedural Regulation issued by him (12 F. R. 5916, Appellant's brief, pp. 17, 23, 55). The sole question remaining is whether the Expediter had the right by regulation or order to establish the orderly procedure for review of orders, which procedure he claims the appellee must first exhaust before challenging by way of defense the order of the Rent Director which rejected the application for de-control (R. 115).

Section 204 (a) of the Act provides that the Housing Expediter shall administer the powers, functions, and duties under Title II thereof relating to Maxi-

imum Rents,¹ and Section 204 (d) confers plenary authority on the Expediter to issue such regulations and orders as he may deem necessary to carry out the provisions of that section and Section 202 (c).² Section 202 (c) (3) provides as an exception to controlled housing accommodations those accommodations created by conversion on or after February 1, 1947, which is the exception upon which the defendant attempts to rely (Brief for appellant, p. 3). The broad authority conferred upon the Expediter is further evident from other provisions of the Act.³ Pursuant to Section 204 (d) the Housing Expediter issued Rent Procedural Regulation 1 (Appellant's brief, p. 4), for review of orders of the character here involved, and

¹ Section 204 (a) of the Act, as amended by Public Law 31, Housing and Rent Act of 1949, 81st Congress, reads:

"Sec. 204. (a) The Housing Expediter shall administer the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties, and the powers, functions, and duties granted to or imposed upon the Housing Expediter by title I of this Act, the Office of Housing Expediter is hereby extended until the close of June 30, 1950."

At the date of trial January 19, 1949 (R. 31) the language of the quoted section was the same except that the expiration date of the Act was then stated as March 31, 1949.

² Section 204 (d) of the Act reads:

"(d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202 (c)."

³ By Section 204 (e) of the Act the Expediter is authorized and directed to create and continue in existence rent advisory boards (Appellant's brief, p. 53). And by Section 204 (b) the Expediter is empowered to remove any or all maximum rents in any defense-rental area, or portion thereof with respect to any class of housing accommodations if in his judgment the need for continuing maximum rents in such area no longer exists (App. *infra*. p. 14).

the order of the Area Rent Director rejecting de-control of the housing accommodations was issued (R. 115)⁴ pursuant to such section.

In considering the authority conferred by Section 204 (d) on the Housing Expediter to issue orders and regulations necessary to carry the Act into effect, in *Woods v. Benson Hotel Corp.*, 75 F. Supp. 743 (D. C. Minn.), affirmed, 168 F. 2d 694 (C. A. 8th), it is said by the lower Court (at p. 747) :

However, by the express language of Section 204 (d) "the Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and Section 202 (c)." This express reference to 202 (c) when coupled with the wording of that section makes it apparent that Congress intended to give the Expediter authority to issue regulations so as to make the section more specific in view of the policy and purposes of the Act.

It must be manifest from both Sections 204 (a) and 204 (d) of the Act that in issuing Rent Procedural Regulation 1 (Appellant's brief, p. 4), the Expediter was acting wholly consistent with the au-

⁴ Section 825.1 of the Controlled Housing Regulation (12 F. R. 4331) in part reads: * * *

"'Expediter' means the Housing Expediter or the Rent Director or such other person or persons as the Expediter may appoint or designate to carry out any of the duties delegated to him by the Act.

"'Rent Director' means the person designated by the Expediter as director of the defense-rental area or such person or persons as may be designated to carry out any of the duties delegated to the Rent Director by the Expediter."

thority conferred by the Act, rather than in conflict with it, as appellee contends. This point is now established by the decisions of four Courts of Appeals, including this Court (see *Babcock v. Koepke*, 175 F. 2d 923 (C. A. 9th); *Gates v. Woods*, 169 F. 2d 440 (C. A. 4th); *Woods v. Durr*, 176 F. 2d 273 (C. A. 3rd); *Smith v. Duldner*, 175 F. 2d 629 (C. A. 6th)).

The attempt to distinguish *Koster v. Turchi*, 173 F. 2d 605 (C. A. 3rd), at page 8 of the brief, is specious. Appellee contends that the tenants were required to exhaust their administrative remedies in that case, looking to a reduction in rent, before seeking equitable relief because the prescribed procedure in that case was in accord with Section 204 (b). This section provides that the Housing Expediter shall by regulation or order make such adjustments in maximum rents as may be necessary to correct inequities or further carry out the purposes of this title (*infra*, p. 14). In issuing Rent Procedural Regulation 1 which requires persons in the position of appellee here to proceed with her administrative review where claims of decontrol under Section 202 (c) are rejected, the Housing Expediter was proceeding in strict accordance with Section 204 (d) of the Act. This section provides that the Expediter may "issue such regulations and orders, * * * as he may deem necessary to carry out the provisions of * * * Section 202 (c)," (*supra*, p. 6). It is under Section 202 (c) that appellee claims decontrol in this case.

Appellee's attempt to argue (Brief, p. 12) that the decision of *Gates v. Woods*, *supra*, should not be followed is unpersuasive (Appellant's brief, p. 23).

The carefully considered opinion rendered in that case has been consistently adhered to and followed (see *Smith v. Duldner*, *supra*, at p. 631; *Koster v. Turchi*, 173 F. 2d 605, at p. 608 (C. A. 3rd)).

In view of what is said above that the Courts properly have the right to review determinations of the Housing Expediter after administrative remedies have been exhausted,⁵ there is no point to answering appellee's argument (Brief, pp. 8-9) that the Housing Expediter may not have exclusive power to determine his own jurisdiction. That the Expediter has the right to make the initial determination whether housing accommodations are subject to the Act and regulations cannot be denied (see *Graylyn-Bainbridge Corp. v. Woods*, 173 F. 2d 790 (C. A. 8th), certiorari denied, 17 U. S. L. W., p. 3376; cf. *Endicott-Johnson Corp. v. Perkins*, 372 U. S. 501; *Oklahoma Publishing Company v. Walling*, 327 U. S. 186).

For the reasons stated above there is also no reason for answering the argument (Brief, pp. 9-10) that the Housing Expediter may not by regulation enlarge the scope of the Act. We have shown that the regulation is fully consistent with the language and purpose of the Act and not inconsistent with it. So, too, no fruitful purpose would be served in replying to the contention of appellee (Brief, pp. 10-12) that

⁵ The rule as to exhaustion of administrative remedies applies not only to cases where the party subject to such rule is plaintiff but also where an issue is raised by way of defense (*La Verne Co-op Citrus Ass'n. v. United States*, 143 F. 2d 415, 419 (C. A. 9th); *Yakus v. United States*, 321 U. S. 414; *United States v. Ruzicka*, 329 U. S. 387; Brief for Appellant, p. 22).

court review is contemplated by the Act. This is not disputed. But the question here is whether appellee has the right in seeking court review to short circuit the administrative procedure that is still available for orderly disposition of her contentions. The Supreme Court decision in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752 (Appellant's brief, p. 33), as well as the decision of this Court in *Babcock v. Koepke*, *supra*, and of *Smith v. Duldner*, *Woods v. Durr*, and *Gates v. Woods*, *supra*, make it clear beyond dispute that appellee has no standing to object to the validity of the Regulation until she has exhausted her administrative remedies.

Estep v. United States, 327 U. S. 114 (Brief, p. 11) does not aid the contention of appellee but supports the rule that administrative remedies must be exhausted before review of an administrative order by the courts. In this decision which involved a criminal prosecution under the Selective Training and Service Act of 1940, an order of the Local Board had fixed the classification of Estep who refused, however, to be inducted into military service, claiming exemption as an ordained minister of the gospel. In holding that the jurisdiction of the Board might be challenged in judicial proceedings, the Court said (327 U. S. p. 123):

Here these registrants had pursued their administrative remedies to the end. All had been done which could be done.

Woods v. Western Holding Corp., 173 F. 2d 655 (Brief, p. 12) is also wholly inapplicable to any contention urged by appellee. The sole issues presented

in that case were whether the structures there involved in Kansas City, Missouri, were "commonly known" as hotels in that community so as to be exempt from control under Section 202 (c) (1) of the Housing and Rent Act of 1947 (*infra*, p. 14), and whether the services supplied constituted "customary hotel services" within the meaning of the Act and Regulation. No question as to the exhaustion of administrative remedies was presented, nor was any question present as to whether additional accommodations were created to make available the exemption involved in the instant case.

Other decisions cited in the brief have no application to the Act and Regulation being considered. As such cases are manifestly not in point in fact or principle, no purpose would be served in discussing them.

III

The defendant did not exhaust her administrative remedy

At page 14 of the brief it is asserted that Section 840.23 of Rent Procedural Regulation 1 provides that a landlord may apply for review to the Regional Rent Administrator or to the Housing Expediter but does not provide that both remedies may be pursued. Such statement is incorrect. As the brief for appellant points out (pages 28, 32) under Section 840.25 of the Procedural Regulation, the defendant had the right of appeal to the Housing Expediter in the event the letter of February 10, 1948, from the Regional Administrator to Appellee's attorney should be regarded as a "decision" (R. 70). In such letter the Regional Administrator advised that investiga-

tion disclosed that the proceedings in the Area Rent Office were handled in accordance with the Rent Regulations and the interpretation of the Regional Attorney (R. 44).

Section 840.24 of the Procedural Regulation (Appellant's brief, p. 58) which states the procedure by the Regional Rent Administrator on applications for review provides that an order entered by the Administrator shall be effective and binding until changed by further order "and shall be final subject only to appeal as provided in Section 840.25 and following of this part." By Section 840.25 of the Regulation the right of appeal to the Housing Expediter from "an order issued under Section 840.24 (except an order remanding to the Rent Director)," is expressly provided (Appellant's brief, p. 59). There was no order of the Regional Administrator remanding the proceeding to the Rent Director and defendant did not pursue such administrative remedy to a conclusion as the Regulation provided. As was pointed out in *Aircraft & Diesel Corp. v. Hirsch*, 331 U. S. 752 (Brief for appellant, pp. 32-33), the machinery must not only be put in motion but also must "be fully performed, before judicial intervention should take place * * *" (331 U. S. at p. 771). "Exhaustion, not merely initiation" of the administrative procedure is required (331 U. S. at p. 774). Defendant was, therefore, precluded from urging the defense in the Court below that the order of the Rent Director rejecting decontrol (R. 115) was erroneous where she had failed to carry her review to the Housing Expediter.

At pages 14 and 15 of the brief while admitting, in effect, that the Procedural Regulation permitted a further appeal to the Housing Expediter, it is contended that the filing of the present action would have halted the pursuit of any administrative remedy by the defendant. There is no merit to such contention. Moreover, the defendant upon availing herself of a further appeal to the Expediter under Section 840.25 might properly have applied for and obtained a stay of the present enforcement proceeding until the prescribed administrative procedure had been exhausted (Appellant's brief, pp. 34-35).

CONCLUSION

It is submitted that the judgment should be reversed upon the ground that the alterations of the duplex structure resulting in the single dwelling unit where two separate dwelling units had previously existed did not constitute "additional housing accommodations created by conversion" within the meaning of the Act and Regulation, and upon the further ground that appellee failed to exhaust her administrative remedies for review of the administrative order which determined that such dwelling unit continued subject to control.

Respectfully submitted.

ED DUPREE,

General Counsel.

HUGO V. PRUCHA,

Assistant General Counsel.

CECIL H. LICHLITER,

Special Litigation,

Attorney, Office of the Housing Expediter,

Washington 25, D. C.

APPENDIX

Pertinent provisions of the Housing and Rent Act of 1947, as amended (50 U. S. C., App., Secs. 1881 et seq.):

SEC. 202. As used in this Title—

* * * * *

(c) The term “controlled housing accommodations” means housing accommodations in any defense-rental area, except that it does not include—

(1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service.

SEC. 204 (b) (1). Subject to the provisions of paragraphs (2) and (3) of this subsection, during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of hous-

ing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title. In the making of adjustments to remove hardships due weight shall be given to the question as to whether or not the landlord is suffering a loss in the operation of the housing accommodations * * *.

No. 12235

United States
Court of Appeals
for the Ninth Circuit

ELMER SCHNEIDMILLER,

Appellant,

vs.

ADOLPH W. ENGSTROM, Trustee in Bank-
ruptcy for Northwest Chemurgy Cooperative, a
Corporation, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division

FILED

JUN 9 - 1948

PAUL P. O'BRIEN,

CLERK

No. 12235

United States
Court of Appeals
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ELMER SCHNEIDMILLER,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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SAM R. SUMNER, Sr.,

Wenatchee, Washington,

Attorneys for Defendant.

In the United States District Court for the
Eastern District of Washington,
Northern Division

In Bankruptcy—No. 744

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a corpora-
tion, Bankrupt,

Plaintiff,

vs.

ELMER SCHNEIDMILLER,

Defendant.

COMPLAINT

Plaintiff alleges as follows:

1. The action arises under Section 70 of the Act of Congress relating to Bankruptcy, (U.S.C. Title 11, Chapter 7, Sec. 110) as hereinafter more fully appears.

2. At all times herein mentioned Northwest Chemurgy Cooperative was and is now a Washington corporation hereinafter sometimes referred to as "Chemurgy".

3. On May 29, 1947, Chemurgy duly filed a Petition for an Arrangement under Chapter XI of the Act of Congress relating to Bankruptcy in the United States District Court for the Western District of Washington, Northern Division, Cause No. 37569. On said date said Court entered an order accepting and approving Chemurgy's Petition for an Arrangement as properly filed under Chapter XI of said Act.

4. Chemurgy was unable to consummate the pro-

posed Arrangement and upon a hearing duly noticed and held pursuant to Section 376(2) of the Act of Congress relating to Bankruptcy, said Court on December 13, 1947, duly made and entered its order that Chemurgy is a Bankrupt under said Act and that Bankruptcy be proceeded with pursuant to the provisions of said Act.

5. Subsequent to said order determining Chemurgy a Bankrupt, after proceedings duly had therefore, plaintiff on January 6, 1948, was by the order of said Court duly appointed Trustee of the estate of said Bankrupt and thereafter on said January 6, 1948, plaintiff duly qualified as Trustee of said estate and since said date at all times has been the duly appointed, qualified and acting Trustee of the estate of said Bankrupt.

6. At all times herein mentioned Sections 5831-4 and 5831-6 of Remington's Revised Statutes of the State of Washington (Laws of 1941, Cha. 103), Secs. 1 and 3 were in full force and effect. Said statutes provide as follows:

“5831-4, Preference by insolvent corporations—
Definition. Words and terms used in this act will be defined as follows: (a) “Receiver” means any receiver, trustee, common law assignee, or other liquidating office of an insolvent corporation. (b) “Date of application” means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is made, or in case the appointment of a receiver is lawfully made without court proceedings, then it means the date on which the receiver is designated, elected or otherwise

authorized to act as such. (c) "Preference" means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class. L. '41, ch. 103, Sec. 1."

"5831-6 Preference voidable when—Trust fund doctrine superseded. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded. L. '41, ch. 103, Sec. 4."

7. For at least four (4) months immediately prior to May 29, 1947. Chemurgy was unable to pay its debts in the ordinary course of business and was insolvent within the meaning of said statutes of the State of Washington.

8. Within said four months' period Chemurgy being then insolvent paid to the defendant above-named a total of \$4,766.03 upon an antecedent debt or debts then past due and owing by Chemurgy to said defendant upon which defendant is entitled to an offset of \$ (None) for credit given within said four months' period.

9. The effect of such payment is to enable the said defendant to obtain a greater percentage of the indebtedness due to said defendant than other creditors of the same class.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$4,766.03 with interest and with costs taxes in favor of the plaintiff and against the defendant.

/s/ EGGERMAN, ROSLING &
WILLIAMS,

/s/ DeWITT WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: Filed May 28, 1948.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant Elmer Schneidmiller.

You are hereby summoned and required to serve upon Eggerman, Rosling & Williams, plaintiff's attorneys, whose address is 918 Joseph Vance Building, Seattle 1, Washington, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated: May 28, 1948.

(Seal)

A. A. LaFRAMBOISE,
Clerk of Court.

By /s/ EVA M. HARDIN,
Deputy Clerk.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 29th day of May, 1948, I received the within summons and complaint and executed same by serving a true copy of same upon Elmer Schneidmiller at St. John, Wash., on May 29th, 1948.

WAYNE BEZONA,

United States Marshal.

By /s/ **CHARLES W. CARLILE,**

Deputy United States Marshal.

Marshal's Fees: Travel \$5.00; Service \$2.00; Total \$7.00.

[Endorsed]: Filed June 5, 1948.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Elmer Schneidmiller, by his attorneys, Hughes & Jeffers and Sam R. Sumner, Sr., and respectfully moves the Court for the entry herein of an order dismissing the above-entitled action, upon the grounds that the plaintiff's complaint herein fails to state a claim upon which relief may be granted.

In support of this motion there is hereto attached statement of the reasons upon which defendant bases this motion.

Dated this 17th day of August, 1948.

HUGHES & JEFFERS,

By /s/ **JOSEPH L. HUGHES,**

/s/ **SAM R. SUMNER, SR.,**

Attorneys for Defendant.

[Endorsed]: Filed Aug. 19, 1948.

In the District Court of the United States for the
Eastern District of Washington,
Northern Division

Civil Action No. 724

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a corpora-
tion, Bankrupt,

Plaintiff,

vs.

F. A. DE VOS d/b/a Ad-Art Printing Co.,
Defendant.

OPINION OF THE COURT

Eggerman, Rosling & Williams, 918 Vance Bldg.,
Seattle, Washington, Attorneys for Plaintiff. Hughes
& Jeffers & Sam R. Sumner, Wenatchee, Washington,
Attorneys for Defendant.

Hughes & Jeffers & Sam R. Sumner, Wenatchee,
Washington; Graves, Kizer & Graves, Old National
Bank Bldg., Spokane 8, Wash.; Thomas Malott, Old
National Bank Bldg., Spokane 8, Wash.; E. A. Cor-
nelius, Paulsen Building, Spokane 8, Wash., Attor-
neys for Defendants in related cases.

Before Driver, District Judge.

Plaintiff brought this action as trustee of North-
west Chemurgy Cooperative, a bankrupt corpora-
tion, referred to as "Chemurgy" in this opinion,
to recover an alleged unlawful preference. The
basic facts, as stated in the complaint, which was
filed on May 28, 1948, are as follows:

On May 29, 1947, Chemurgy filed a petition for

an arrangement under Chapter XI of the Bankruptcy Act (11 U.S.C.A., Sec. 701 et seq.), but was unable to consummate the proposed arrangement and was adjudicated bankrupt on December 13, 1947. Plaintiff was appointed trustee on January 6, 1948. For at least four months immediately prior to May 29, 1947, Chemurgy was unable to pay its debts in the ordinary course of business and was insolvent within the meaning of the laws of the State of Washington. During that time, it paid to defendant a certain amount upon an antecedent debt. The prayer is for judgment against the defendant in that amount.

As expressly avowed in the complaint, the action is based upon a Washington statute, which provides that within specified limitations, a receiver (defined to include trustee) may recover a preference, made by an insolvent corporation.¹ The

¹Chap. 103, Laws of Wash., 1941 (Rem. Rev. Stat., Secs. 5831-4, 5831-5, 5831-6), which reads, in part, as follows: "Section 1. Words and terms used in this act shall be defined as follows: (a) 'Receiver' means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation. (b) 'Date of application' means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is made; or in case the appointment of a receiver is lawfully made without court proceedings, then it means the date on which the receiver is designated, elected or otherwise authorized to act as such. (c) 'Preference' means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such

limitations are, first, that the preference must occur within four months prior to the date of application for the appointment of the trustee and, second, that the action to recover the preference must be commenced within six months thereafter. Defendant's motion to dismiss challenges the sufficiency of the complaint to show compliance with the statutory limitations. If a claim, upon which relief can be had, has not been made out in accordance with the statute, the motion should be granted.²

corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class. Sec. 2. If not otherwise limited by law, actions in the courts of this state by a receiver to recover preferences may be commenced at any time within but not after six (6) months, from the date of application for the appointment of such receiver. Sec. 3. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded."

²The complaint does not state a claim for avoidance of a preference under Sec. 60 of the Bankruptcy Act (11 U.S.C.A., Sec. 96) since that section requires a showing that the favored creditor had reasonable cause to believe the debtor was insolvent. The Washington Statute has no such requirement.

The crucial event on which the reckoning of time is based as to both limitations is the filing of the application for the appointment of the trustee. The first inquiry in the present case, then, logically, should be whether the filing of the petition for an arrangement was equivalent to an application for the appointment of the trustee within the meaning of the Washington Act. Section 376, Chapter 11, of the Bankruptcy Act (11 U.S.C.A., Sec. 776) provides that when an original petition for arrangement is filed and the arrangement is not consummated, the court may, without any further pleading, adjudicate the debtor a bankrupt and carry on the bankruptcy proceedings in the usual way. The petition for arrangement, from its inception, serves the purpose of an alternative petition for adjudication. When the arrangement fails of accomplishment, adjudication and subsequent bankruptcy proceedings, including the appointment of a trustee, follow as a matter of course. The petition for arrangement is the only petition, or application, ever filed, pursuant to which the appointment of the trustee is made. In legal effect, it is the same thing as the application for the appointment of the trustee.

The petition was filed herein on May 29, 1947, and the action was not commenced until May 28, 1948. Obviously, it is barred by the requirement of the State statute that it be commenced within six months, if that statute is applicable and is not superseded by some over-riding provision of the Federal Bankruptcy Act.

The plaintiff earnestly urges that the State statute is not applicable because of the following language (italicized for emphasis) of section 2, namely: "*If not otherwise limited by law,*" an action may be brought by a trustee "*in the courts of this state*" to recover a preference within but not after six months from the filing of the petition for the appointment of the trustee. The argument is that the action is "otherwise limited" by the general two-year limitation in Section 11e of the Bankruptcy Act (11 U.S.C.A., 1947 pocket part, Sec. 29e) and, furthermore, that the six months' limitation in the State Act, by its terms, is restricted to State Court actions and is wholly inoperative in actions prosecuted in the Federal Courts. I do not so construe the State Act. I think that the words, "unless otherwise limited by law," apply only to the affirmative grant of the right to bring the action within the specified time and should not be construed, as plaintiff's argument implies, to mean "unless otherwise *extended* by law." The statute says that an action to recover a preference *may* be brought in six months, but the phrase under consideration makes it clear that the grant is not an absolute one and will not sustain an action barred by some other applicable law. It may have been included in Section 2 in order to avoid all possibility of conflict with the provision of Section 3 (Rem. Rev. Stat. 5831-6) limiting recovery of preferences to transactions which occurred within four months prior to the application for appointment of the receiver or trustee. The language of Section 2 makes it clear that if

the action is barred by Section 3, the affirmative grant in Section 2 will not revive it.

However, I think the language in Section 2 "in the courts of this State," should not be construed as a legislative declaration that if the action to set aside a preference is brought in a Federal Court, or in a court of a foreign state, the six months' limitation does not apply. The statute is a further modification of the trust fund doctrine, a long-standing Washington rule that the assets of an insolvent corporation constitute a trust fund for the benefit of its creditors and that transactions, which prefer one creditor over another, are voidable.³ The Washington Supreme Court had described the doctrine as "our court made rule."⁴ It was a natural thing for the Legislature, in restricting it, to use the expression, "in the courts of this State." The six months' limitation in Section 2, since it is an integral part of the statute granting the right of action, by a generally accepted rule, is not an ordinary limitation of the remedy, but a limitation of the right, which must be accepted and applied by the courts of any other state where an action to enforce the right may be brought.⁵ It would, in-

³See *Whiting v. Rubenstein*, 7 Wn. (2d) 204, 214. There was an earlier restriction of the trust fund doctrine in Chap. 47, Laws of Wash., 931 (Rem. Rev. Stat. 5831-1, 5831-2, 5831-3, repealed by the 1941 Act (Chap. 103, Laws of Wash., 1941).

⁴*Meier v. Commercial Tire Co.*, 179 Wash. 449, 451.

⁵See Restatement, Conflict of Laws, Sec. 605; 15 C.J.S., Conflict of Laws, Sec. 22e.

deed, be a violent assumption that the Legislature, by the mere use of the phrase, "in the courts of this State," intended to set aside the well known rule and make its express, special limitation of the right of action, which it had created, operative only in the courts of Washington and not in any other courts.

Plaintiff argues that even if the six months' limitation, set up by the Washington statute, is applicable in Federal Court actions, the limitation, nevertheless, is superseded by Section 11e of the Bankruptcy Act (11 U.S.C.A., 1947 pocket part, 29e), which provides, in part:

"A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy."

I think that there is merit in the argument. The language of the section is clear and unambiguous. It specifically authorizes a trustee to bring an action, within two years after adjudication, on a claim which would have expired by State law between the date of the filing of the petition and the date of adjudication. The legislative history of 11e, moreover, indicates that such was the intention of Congress.⁶

⁶See *Sproul v. Gambone*, 34 F. Supp. 441, 444, and *Herget v. Central Bank Co.*, 324 U. S. 4, footnote 5, p. 7.

Prior to the passage of the Chandler Act (52 Stat. 840) in 1938, Section 11d of the Bankruptcy Act of 1898 (30 Stat. 544, 549) barred actions brought by or against trustees subsequent to two years after the bankrupt estate had been closed. There was a sharp conflict among the courts as to whether it took precedence over State statutes of limitation in cases inherited by the trustee from the bankrupt or from his creditors. One of the main reasons for the enactment of the new Section 11e was to settle that conflict by giving the trustee the right to bring any type of action, whether acquired by inheritance or otherwise, within two years after adjudication if the limitation under applicable Federal or State law had not expired at the time of the filing of the petition for adjudication.⁷

Defendant argues, however, that since the six months' limitation is contained in the same State statute, which creates the right of action, compliance with its requirements is a condition precedent to the bringing of the action and that the plaintiff must take the statute with the condition or not at all.

As stated above, the six months' limitation in the State statute is not an ordinary limitation that a defendant may assert as a remedial bar, but is a condition upon the substantive right to recover a

⁷For an enlightening discussion of the conflict under old Sec. 11d and the effect upon it of the enactment of the new Sec. 11e of the Chandler Act, see *McBride v. Farrington*, 60 F. Supp. 92. See also *Herget v. Central Bank Co.*, cited in footnote 6.

preference under the statute. It has, in fact, been so construed by the Washington Supreme Court.⁸ Congress, however, under the Federal Constitution, has the broad power to establish uniform laws on the subject of bankruptcies. U. S. Const., Art. I, Sec. 8, Clause 4. That subject has been defined by the Supreme Court as "the relations between and insolvent or non-paying, or fraudulent, debtor and his creditors extending to his and their relief." *Wright v. Union Central Life Ins. Co.*, 304 U. S. 502, 513. This broad power of Congress, when it comes into conflict with State law, is not limited to the procedural field. It may, and, in practice, frequently does, affect substantive rights as well. The discharge of a debtor directly and vitally affects the substantive rights of his creditors.

A Court of Bankruptcy may adversely affect the substantive interests of lien holders, pledgees, and mortgagees by marshalling the liens and selling the property free of encumbrances, or by enjoining the sale of collateral or of the mortgaged real property in order to effectuate the purposes of the Bankruptcy Act.⁹ The only restrictions on the plenary, constitutionally conferred bankruptcy power of Congress are those to be found in other provisions of the Constitution. In the exercise of the power,

⁸*Morris v. Orcas Lime Co.*, 185 Wash. 126, 130; *Peebles v. Hayes*, 4 Wn. (2d) 253, 257.

⁹*Van Huffer v. Harkelrode*, 284 U. S. 225, 227; *Continental Illinois Nat. Bank and Trust Co. v. Chicago R. I. & P. Ry. Co.*, 294 U. S. 648, 680-681; *Wright v. Vinton Branch*, 300 U. S. 470.

Congress may alter and adversely affect substantive property rights so long as it does not go beyond the limits fixed by the due process clause,¹⁰ or by the clause which forbids the taking, without just compensation, of private property for public use,¹¹ of the Fifth Amendment.

It is my conclusion, therefore, that by the enactment of Section 11e of the Chandler Act, Congress undertook to supersede a State statute of limitations in a case such as the one now before me, regardless of whether the limitation would bar the remedy or the right and that in so doing, Congress did not exceed the power conferred upon it by the bankruptcy provisions of the Constitution. My views find support in *Sproul v. Gambone*, 34 F. Supp. 441 (cited in footnote 6), decided in 1940. There the Court had under consideration a Pennsylvania bulk sales statute, which provided that a proceeding against the purchaser to set aside a sale prohibited by the Act must be brought within ninety days after the date of sale. The action in the Federal District Court was not brought until after the ninety-day period had expired. The plaintiff contended that Section 11e of the Bankruptcy Act superseded the limitation fixed by the State law and Court sustained his contention.

The case of *In Re Appalachian Publishers, Inc.*, 29 F. Supp. 1021, appears to be contrary to my views. There the Court held that a special limita-

¹⁰*Wright v. Union Central Ins. Co.*, 304 U. S. 502.

¹¹*Louisville Bank v. Radford*, 295 U. S. 555.

tion in a Federal Statute took precedence over the general two-year limitation in the Bankruptcy Act. However, the opinion does not discuss Section 11e of the Chandler Act and the case was decided in 1939, before the Supreme Court, in *Herget v. Central Bank Co.* (cited in footnote 6), had expressed its conception of the broad reach of that section. At any rate, I do not accept the theory that when a statute, creating a right of action, imposes a time limit on its exercise, the right does not come into existence at all unless and until an action to enforce it is instituted within the specified time. I prefer the reasoning, implicit in *Sproul v. Gambone*, that such a limitation does not prevent the genesis of the right, but only makes provision for its expiration when the limitation has run.

In the present case, upon the filing of the petition for appointment of a trustee, within four months after the preference alleged in the complaint, a right of action came into being under the terms of the State statute and the right continued to exist for a period of six months. At the expiration of that time, the right of action ordinarily would have died, but in this case, Section 11e of the Bankruptcy Act preserved and extended it for the period of two years subsequent to adjudication.

The defendant's motion to dismiss will be denied.

For the reasons stated above, the motion to dismiss will be denied also in each of the following cases:

No. 725, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. George W. Batterman, Jr. & George Batterman, Sr., d/b/a Batterman's Sand & Gravel Co.

No. 727, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Joe Earhart.

No. 728, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. E. T. Pybus.

No. 729, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Wenatchee Lumber Co., a corporation.

No. 731, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Wells & Wade, Inc., a corporation.

No. 733, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Interstate Telephone Co., a corporation.

No. 734, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. W. R. McMullen and B. F. McMullen, d/b/a McMullen Office Equipment Co.

No. 735, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a cor-

poration, Bankrupt, vs. Peshastin Lumber & Box Co.

No. 736, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. F. W. Heimbigner.

No. 737, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Rufus Woods.

No. 738, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. J. A. Weber.

No. 740, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. W. N. Childs.

No. 742, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. R. M. Wiley.

No. 744, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Elmer Schneidmiller.

No. 745, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Arthur Benzel.

/s/ SAM M. DRIVER,

United States District Judge.

Dated this 4th day of January, 1949.

[Endorsed]: Filed Jan. 5, 1949.

In the District Court of the United States, for the
Eastern District of Washington,
Northern Division

Civil Action—No. 744

ADOLPH W. ENGSTROM, Trustee in Bank-
ruptcy for Northwest Chemurgy Cooperative, a
corporation, Bankrupt,

Plaintiff,

vs.

ELMER SCHNEIDMILLER,

Defendant.

ORDER DENYING MOTION TO DISMISS

The motion of the defendant to dismiss this action came on regularly for hearing before the undersigned Judge of the above-entitled Court on August 23rd, 1948, the parties being represented in court by their attorneys of record herein. The Court heard the argument of counsel and thereafter considered the briefs filed on behalf of the parties. On January 5th, 1948, the Court made and filed his opinion herein denying said motion.

Now, Therefore, in accordance with said opinion and ruling and pursuant thereto, it is hereby ordered that defendant's said motion to dismiss be and the same is hereby denied. The exception of the defendant is noted.

Done in Open Court this 27th day of January,
1949.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ DeWITT WILLIAMS,
Of attorneys for plaintiff.

Approved as to Form and Entry:

/s/ HUGHES & JEFFERS,
Attorney for defendant.

[Endorsed]: Filed Jan. 27, 1949.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and answering plaintiff's complaint herein admits as follows:

I.

Answering Paragraphs one to nine inclusive, defendant admits the allegations of said paragraphs.

Wherefore having fully answered, defendant prays that the Court conclude as a matter of law that the plaintiff is not entitled to recover herein and that this action be dismissed with prejudice and with costs taxed in favor of the defendant and against the plaintiff.

/s/ HUGHES & JEFFERS,
/s/ SAM R. SUMNER, SR.,
Of Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed March 25, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The undersigned Judge of the above-entitled Court having heretofore overruled and denied defendant's motion to dismiss this action and the defendant thereafter having filed herein his answer admitting each of the allegations of the complaint, now, therefore, the Court finds the facts in accordance with the allegations of the complaint as follows:

FINDINGS OF FACT

1. The action arises under Section 70 of the Act of Congress relating to Bankruptcy, (U.S.C. Title 11, Chapter 7, Sec. 110) as hereinafter more fully appears.

2. At all times herein mentioned Northwest Chemurgy Cooperative was and is now a Washington corporation hereinafter sometimes referred to as "Chemurgy."

3. On May 29, 1947, Chemurgy duly filed a Petition for an Arrangement under Chapter XI of the Act of Congress relating to Bankruptcy in the United States District Court for the Western District of Washington, Northern Division, Cause No. 37569. On said date said Court entered an order accepting and approving Chemurgy's Petition for an Arrangement as properly filed under Chapter XI of said Act.

4. Chemurgy was unable to consummate the pro-

posed Arrangement and upon a hearing duly noticed and held pursuant to Section 367 (2) of the Act of Congress relating to Bankruptcy, said Court on December 13, 1947, duly made and entered its order that Chemurgy is a Bankrupt under said Act and that Bankruptcy be proceeded with pursuant to the provisions of said Act.

5. Subsequent to said order determining Chemurgy a Bankrupt, after proceedings duly had therefore, plaintiff on January 6, 1948, was by the order of said Court duly appointed Trustee of the estate of said Bankrupt and thereafter on said January 6, 1948, plaintiff duly qualified as Trustee of said estate and since said date at all times has been the duly appointed, qualified and acting Trustee of the estate of said Bankrupt.

6. At all times herein mentioned Sections 5831-4 and 5831-6 of Remington's Revised Statutes of the State of Washington (Laws of 1941, Ch. 103), Secs. 1 and 3 were in full force and effect. Said statutes provide as follows:

"5831-4, Preference by insolvent corporation—
Definition. Words and terms used in this act shall be defined as follows: (a) "Receiver" means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation. (b) "Date of application" means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is made, or in case the appointment of a receiver is lawfully made without court proceedings, then it

means the date on which the receiver is designated, elected or otherwise authorized to act as such. (c) "Preference" means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class. L. '41, ch. 103, Sec. 1."

"5831-6 Preference voidable when—Trust fund doctrine superseded. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded. L. '41, ch. 103, Sec. 4."

7. For at least four (4) months immediately prior to May 29, 1947, Chemurgy was unable to pay its debts in the ordinary course of business and was insolvent within the meaning of said statutes of the State of Washington.

8. Within said four months' period Chemurgy being then insolvent paid to the defendant above named a total of \$4,766.03 upon an antecedent debt then past due and owing by Chemurgy to said de-

defendant upon which defendant is entitled to no offset.

9. The effect of such payment is to enable the said defendant to obtain a greater percentage of the indebtedness due to said defendant than other creditors of the same class.

/s/ SAM M. DRIVER,

Judge.

From the foregoing findings of fact the Court draws the following:

CONCLUSION OF LAW

1. Plaintiff is entitled to judgment against the defendant in the sum of \$4,766.03 with interest thereon at the rate of 6% per annum from May 28, 1948, until paid and for plaintiff's costs herein to be taxed in the sum of \$42.00.

The foregoing findings of fact and conclusion of law made and entered this 25th day of March, 1949.

/s/ SAM M. DRIVER,

Judge.

Presented by:

/s/ DeWITT WILLIAMS,

Of attorneys for plaintiff.

Approved as to Form for Entry:

/s/ HUGHES & JEFFERS,

Of attorneys for defendant.

NOTATION OF DEFENDANT'S OBJECTION

It is hereby noted that at the time the foregoing conclusion of law was made, the defendant made known to the Court his desire that the Court conclude as a matter of law, that the plaintiff is not entitled to recover from the defendant on the ground that relief cannot be granted on the complaint and facts found for the following reasons:

1. The filing of a petition for an arrangement under Chapter XI of the Act of Congress relating to Bankruptcy was not the filing of a petition for the appointment of a receiver within the meaning of Remington Revised Statutes of the State of Washington, 5831-4, and therefore the payment referred to in Paragraph 8 of the Findings of Fact herein was not made within the four (4) months period designated by Rem. Rev. Stat. 5831-6 and/or

2. This action was not commenced within the six months period designated in Rem. Rev. Stat. 5831-5.

This notation of objection and request for dismissal of this action made this 25th day of March, 1949.

/s/ SAM M. DRIVER,
Judge.

[Endorsed]: Filed March 25, 1949.

In the United States District Court for the Eastern
District of Washington, Northern Division

In Bankruptcy—No. 744

ADOLPH W. ENGSTROM, Trustee in Bank-
ruptcy for Northwest Chemurgy Cooperative, a
corporation, Bankrupt,

Plaintiff,

vs.

ELMER SCHNEIDMILLER,

Defendant.

JUDGMENT

This matter came on regularly before the under-
signed Judge of the above-entitled Court on the
25th day of March, 1949, for the entry of judgment
pursuant to findings of fact and conclusions of law
entered this date; now, therefore, pursuant to said
findings and conclusion it is hereby

Ordered, Adjudged and Decreed that the plaintiff
Adolph W. Engstrom, as Trustee in Bankruptcy for
the above-named bankrupt corporation, be, and he
is hereby, granted judgment against the defendant,
Elmer Schneidmiller, in the sum of Four Thousand
Seven Hundred Sixty-six Dollars and three Cents
(\$4,766.03), with interest thereon at the rate of 6
per cent per annum from May 28, 1948, until paid
and for plaintiff's costs herein to be taxed by the
Clerk in the sum of \$42.00.

This judgment made and entered in open Court this 25th day of March, 1949.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ DeWITT WILLIAMS,
Of Attorneys for Plaintiff.

Approved as to form for entry.

/s/ HUGHES & JEFFERS,
/s/ SAM R. SUMNER, SR.,
Of Attorneys for Defendant.

[Endorsed]: Filed March 25, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

DISBURSEMENTS

Clerk's Fees, \$15.00; Marshal's Fees, \$7.00; Attorney's Fees, \$20.00. Total, \$42.00; Amount Allowed, \$42.00.

Taxed March 25th, 1949.

/s/ A. A. LaFRAMBOISE,
Clerk.

United States of America,
Eastern District of Washington—ss:

DeWitt Williams, being duly sworn, deposes and says: That he is one of attorneys for the Plaintiff in the above-entitled cause; and as such has knowledge

of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

/s/ DeWITT WILLIAMS.

Subscribed and sworn to before me, this 25th day of March, 1949.

(Seal) /s/ A. A. LaFRAMBOISE,
Clerk.

[Endorsed]: Filed Mar. 25, 1949.

In the United States District Court for the Eastern
District of Washington, Northern Division

Cases Numbered 724, 725, 727, 728, 729, 731, 733,
734, 735, 736, 737, 738, and 744, 739, 740, 741.

In Re Actions by Adolph W. Engstrom, Trustee in
Bankruptcy for Northwest Chemurgy Coopera-
tive, a corporation, Bankrupt, to Recover Pref-
erences.

STIPULATION

Adolph W. Engstrom, Trustee in Bankruptcy for
Northwest Chemurgy Cooperative, has filed in the
above-entitled court certain actions to recover pref-
erences alleged to have been paid by said bankrupt

corporation, which actions include those against the following defendants and bearing the following case numbers:

Engstrom v. Florin—No. 741.

Engstrom v. Koch—No. 739.

Engstrom v. DeVos—No. 724.

Engstrom v. Batterman—No. 725.

Engstrom v. Earhart—No. 727.

Engstrom v. Pybus—No. 728.

Engstrom v. Wenatchee Lumber Co.—No. 729.

Engstrom v. Wells & Wade, Inc.,—No. 731.

Engstrom v. Interstate Telephone Co.—No. 722.

Engstrom v. McMullen—No. 734.

Engstrom v. Peshastin Lumber & Box Co.—No. 735.

Engstrom v. Heimbigner—No. 736.

Engstrom v. Woods—No. 737.

Engstrom v. Weber—No. 738.

Engstrom v. Schneidmiller—No. 744.

Engstrom v. Childs—No. 740.

Motions to Dismiss the Complaints in said actions have been argued before the Honorable Sam Driver, Judge of the above-entitled Court, and the motions have been denied and overruled. The Defendants in said numbered actions desire an appeal from said ruling and the parties hereto agree to abide by the

results reached upon the final appeal from said ruling as hereinafter provided, such appeal to be taken from judgment for the plaintiff to be entered in the case hereinafter designated.

The parties to said actions listed above, by their attorneys of record therein, hereby agree as follows:

1. An answer will be filed immediately in Engstrom v. Schneidmiller, Case No. 744, admitting the allegations of the complaint, and findings and judgment in accordance with the allegations and prayer of the complaint will be approved as to form by the defendant as soon as possible in order that appeal may be taken from the entry of said judgment. Appropriate statements will be endorsed on the court's conclusions evidencing the fact that the defendant has made known to the court his objection to the entry of said conclusions and his desire that the action be dismissed because the complaint fails to state a claim on which relief can be granted. The filing of said answer and the approval as to form of said findings and judgment shall in no event be deemed a waiver of the position of the defendant in the action in which judgment is entered as aforesaid, that the complaint fails to state a claim upon which relief can be granted.

2. In the event the judgment entered in said Case No. 744 is affirmed upon final appeal, it is agreed that judgment may be taken in accordance with prayer of the complaints in each of the above-numbered cases, save in those cases where a dispute exists as to the amounts received in the four months'

period that are claimed to be preferential. In such cases it may be necessary to present the facts to the court in order to determine the amount of preference, but as soon as the disputed amounts have been determined by the court, judgments in the amount determined by the court shall be entered as hereinafter provided in the same manner and with like effect as in the cases where the amounts received in the four months' period are not in dispute. However, in such of the cases where there is no issue as to the amounts received in said four months' period the defendants therein, in such event, agree to file such answers and to approve for entry such findings of fact and conclusions of law as may be necessary to obtain the immediate entry of judgments in accordance with the prayers of the complaints in said cases, from which judgments there will be no appeal.

3. The plaintiff in said actions hereby agrees that if, upon final appeal from the judgment entered in said Case No. 744, it is held that the complaint therein does not state facts upon which relief can be granted, and therefore said action is ordered dismissed, then the plaintiff will dismiss with prejudice the remainder of said above-numbered cases.

4. To carry out the intent of this agreement, it is agreed that pending the appeal in said Case No. 744, no further action will be required of any of the parties and the above-entitled court will be requested to hold the cases in abeyance pending said appeal and final disposition of these cases as agreed upon herein.

5. At least six (6) copies of this stipulation and agreement will be executed on behalf of the parties to said actions by their attorneys of record and any party may file an executed copy or a photostatic copy of this stipulation in any of said above-numbered cases, such photostatic copy to have the same force and effect as an original executed copy.

Dated this 24th day of March, 1949.

W. N. CHILDS,

By E. A. CORNELIUS,
His Attorney.

MRS. HERMAN KOCH,
HERMAN KOCH,
DAVE FLORIN,

By E. A. CORNELIUS,
Their Attorney.

F. A. DE VOS,
GEORGE E. BATTERMAN, SR., & GEORGE
W. BATTERMAN, JR., d/b/a BATTER-
MAN'S SAND & GRAVEL CO.,
JOE EARHART,
E. T. PYBUS,
WENATCHEE LUMBER CO.,
WELLS & WADE, INC.,
PESHASTIN LUMBER & BOX CO.,
F. W. HEIMBIGNER,
RUFUS WOODS,
J. A. WEBER,
ELMER SCHNEIDMILLER,
By HUGHES & JEFFERS,
Their Attorneys.

INTERSTATE TELEPHONE COMPANY,
By GRAVES, KIZER & GRAVES,
Its Attorneys.

W. R. McMULLEN,
By THOS. MALETT,
His Attorney.

ADOLPH W. ENGSTROM, Trustee in Bank-
ruptcy for NORTHWEST CHEMURGY
COOPERATIVE,
By EGGERMAN, ROSLING & WILLIAMS,
DE WITT WILLIAMS,
His Attorneys.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, Plaintiff, and Messrs. Eggerman, Rosling & Williams, your attorneys.

You and each of you are hereby notified that the above-named defendant, Elmer Schneidmiller, does hereby appeal to the United States Circuit Court of Appeals of the Ninth Circuit from the final judgment rendered and entered in the above-entitled cause on the 25th day of March, 1949, and from each and every part thereof.

Dated this 14th day of April, 1949.

/s/ JOSEPH L. HUGHES,

/s/ BENJAMIN H. KIZER,

Attorneys for Defendant Elmer
Schneidmiller.

GRAVES, KIZER & GRAVES,
Of Counsel.

Copy of this Notice of Appeal mailed DeWitt Williams, of Attorneys for Plaintiff, this 14th day of April, 1949.

A. A. LaFRAMBOISE,
Clerk.

/s/ EVA N. HARDIN,
Deputy Clerk.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents, That we, Elmer Schneidmiller, as principal, and Fireman's Fund Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of California and duly authorized to transact the business of indemnity and suretyship in the State of Washington, as Surety, are held and firmly bound unto the plaintiff in the full and just sum of Two Hundred Fifty Dollars (\$250.00) to be paid to the said plaintiff, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, his certain attorneys, personal representatives or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs and personal representatives, jointly and severally, by these presents.

Dated this 14th day of April, 1949.

Whereas, lately at a District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in said Court between the said Adolph W. Engstrom, Trustee, as aforesaid plaintiff, and Elmer Schneidmiller, defendant, a judgment was rendered against the said Elmer Schneidmiller and the said Elmer Schneidmiller is appealing from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, the condition of the above obligation is such, that if the said Elmer Schneidmiller shall prosecute

said appeal to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

ELMER SCHNEIDMILLER,
Principal.

By /s/ JOSEPH L. HUGHES,
By /s/ BENJAMIN H. KIZER,
His Attorneys.

(Seal) FIREMAN'S FUND
INDEMNITY COMPANY,
By /s/ Illegible.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Herewith we hand you notice of appeal and bond on appeal in the above-entitled cause.

Will you please prepare the record on appeal in the manner provided by Rule 75 consisting of all material pleadings, which includes:

1. Complaint of plaintiff.
2. Motion to dismiss of defendant.
3. Opinion of court.
4. Answer.
5. Findings of fact and conclusions of law.
6. Notice of defendant's objections.

7. Judgment.
8. Stipulation of March 24, 1949.
9. Notice of appeal.
10. This designation.

Yours faithfully,

/s/ JOSEPH L. HUGHES,
/s/ BENJAMIN H. KIZER,
Attorneys for Defendant.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the Original, except as noted,

Complaint. Summons and return of service on defendant. Motion to dismiss, defendant's. Opinion of the court on motion to dismiss, copy which I certify to be a true and correct copy of Original on file in Cause No. 724 and applicable to this cause. Order denying motion to dismiss. Answer of defendant. Findings of fact and conclusions of law. Judgment. Memorandum of costs. Stipulation to hold cases in abeyance pending this appeal, copy which I certify to be a true and correct copy of Original on file in Cause No. 724 and applicable to this cause. Notice of appeal. Bond on appeal. Designation of record on appeal on file in the above-entitled cause, and that

the same constitutes the record for hearing of the Appeal from the Judgment of the District Court in the United States Court of Appeals for the Ninth Circuit as called for by the Appellant in his designation of record on appeal.

I further certify that the above enumerated documents constitute the complete file in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 28th day of April, A.D. 1949.

(Seal) /s/ A. A. LaFRAMBOISE,
Clerk of said District Court.

[Endorsed]: No. 12235. United States Court of Appeals for the Ninth Circuit. Elmer Schneidmiller, Appellant, vs. Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a Corporation, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed May 2, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12235

ELMER SCHNEIDMILLER,

Appellant.

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a corpora-
tion, bankrupt,

Respondent.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

To Adolph W. Engstrom, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a corpora-
tion, bankrupt, and to Messrs. Eggerman, Rosling
& Williams, his attorneys:

You and each of you are hereby notified that ap-
pellant's statement of points on this appeal is as
follows:

First: Chemurgy's petition for an arrangement was
not an application for an appointment of a receiver,

Second: Appointment of trustee in bankruptcy not
made "pursuant to" Chemurgy's petition for an ar-
rangement,

Third: Respondent's suit not brought in time, and
that the designation of record by appellant is as
follows: Complaint, summons and return of service
on defendant, motion to dismiss, defendant's; opinion
of the court on motion to dismiss, order denying mo-

tion to dismiss, answer of defendant, findings of fact and conclusions of law, judgment, memorandum of costs, stipulation to hold cases in abeyance pending this appeal, notice of appeal, bond on appeal, designation of record on appeal, clerk's certificate.

Dated May 7, 1949.

/s/ JOSEPH L. HUGHES,
/s/ BENJAMIN H. KIZER,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed May 12, 1949. Paul P. O'Brien,
Clerk.

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United States
Court of Appeals
For the Ninth Circuit

ELMER SCHNEIDMILLER,

Appellant,

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a Corpora-
tion, Bankrupt,

Appellee.

OPENING BRIEF OF APPELLANT

JOSEPH L. HUGHES,
BENJAMIN H. KIZER,
Old National Bank Building,
Spokane, Washington.

GRAVES, KIZER & GRAVES
Of Counsel

*Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division*

FILED
JUL 11 1949

United States
Court of Appeals
For the Ninth Circuit

ELMER SCHNEIDMILLER,

Appellant,

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a Corpora-
tion, Bankrupt,

Appellee.

OPENING BRIEF OF APPELLANT

JOSEPH L. HUGHES,
BENJAMIN H. KIZER,
Old National Bank Building,
Spokane, Washington.

GRAVES, KIZER & GRAVES
Of Counsel

*Appeal from the United States District Court
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I.

Statement Showing Jurisdiction

This is an action brought by a trustee in bankruptcy to recover an alleged preference claimed to be owing to the bankrupt estate. It is, therefore, a controversy "relating to bankruptcy" under Sections 47-48 of 11 USCA. See also 28 USCA, Section 225(c) (U. S. Judicial Code, Sec. 128 amended).

II.

Statement of Case

This is one of quite a number of suits brought by appellee to recover alleged preferences whose final determination depends on this appeal. (See Stipulation, Tr. 29-34.) This appeal raises three issues of law, appellant contending that appellee's complaint fails to state a cause of action. The basic facts, as pleaded in the complaint which was filed on May 28, 1948, are as follows:

On May 29, 1947, Northwest Chemurgy Cooperative, a corporation herein referred to as "Chemurgy," filed its Petition for an Arrangement under Chapter XI of the Bankruptcy Act (11 USCA, §§ 701 et seq.). But after more than six months, then finding itself unable to consummate its proposed Arrangement, it was adjudicated bankrupt on December 13, 1947. Appellee was appointed trustee on January 6,

1948. For at least four months immediately prior to May 29, 1947, Chemurgy was unable to pay its debts in the ordinary course of business which made it insolvent within the meaning of the laws of the State of Washington.

During the four months prior to May 29, 1947, Chemurgy paid to appellant \$4,766.03 upon an antecedent debt. The prayer is for judgment against the appellant in that amount.

As expressly avowed in the complaint, the action is based upon a Washington statute (Sections 5831-4-6 Remington's Revised Statutes) (Tr. 3), for the convenience of the court set forth as an appendix at the end of this brief, which provides that *if* a receiver (defined to include trustee) bring suit within six months from the date of the application for his appointment, he may recover all preferential payments made by the insolvent corporation within four months before the date of application for the appointment of such receiver.

Appellant challenged the sufficiency of the complaint to show compliance with the statutory limitations by his motion to dismiss (Tr. 6). That being overruled by the trial court, he then raised the same questions by his answer (Tr. 21), and judgment in favor of appellee followed.

III.

Specification of Errors

1. The Court erred in holding that appellee's complaint stated a cause of action.

2. The Court erred in holding that the filing of a Petition for an Arrangement under Chapter XI of the Act of Congress Relating to Bankruptcy (11 USCA §§ 701-724) constituted an application for the appointment of a receiver within the meaning of Remington's Revised Statutes of the State of Washington, § 5831-4.

3. The Court erred in holding that the payment referred to in paragraph 8 in the findings of fact herein (Tr. 24) was made within the four months' period designated by Remington's Revised Statutes, § 5831-6.

4. The Court erred in holding that this action was commenced within the six months' period designated in Remington's Revised Statutes, § 5831-5.

IV.

Argument

Prefatory. It will be seen that this lawsuit revolves largely around a determination of the date of the "application for the appointment of a receiver, pursuant to which application such appointment is made," (§ 5831-4, R. R. S., see Appendix). By the

terms of the statute the receiver must sue within six months of the date of that application, and he can recover only those preferences made within four months of that same date of application. Under the facts as stated in his complaint to sustain his recovery, appellee must contend:

First: That the mere petition of a debtor for an Arrangement under the Chandler Act is necessarily an application for the appointment of a receiver, even though the debtor is insolvent only in the Washington sense that it is unable to meet its obligations in due course, and even when such petition for an Arrangement does not ask for such appointment;

Second: That, where no receiver or trustee is petitioned for or appointed until the debtor has finally acknowledged its inability to consummate its Arrangement and has confessed its willingness to be adjudged bankrupt, the appointment of a trustee in bankruptcy is nevertheless made "pursuant to" such original petition for an Arrangement; and

Third: That the limitation to sue of the Bankruptcy Act (11 USCA 1947 Pocket Part, 29e)¹ strikes down the requirement of the Washington statute (§ 5831-5, Remington's Revised Statutes—see Appendix) that such suit must be brought within six months, although that requirement is made by this statute a condition precedent to his right to sue.

The first three assignments of error express our dissent from the first and second contentions above set forth.

¹This is §11e of the Bankruptcy Act. We shall refer to it consistently as "§ 29e" herein.

First: CHEMURGY'S PETITION FOR AN ARRANGEMENT WAS NOT AN APPLICATION FOR AN APPOINTMENT OF A RECEIVER. This calls for a concise analysis of the "Arrangement" provisions of the Bankruptcy Act found in 11 USCA, §§ 701 et seq. contained in the Chandler Act enacted by Congress in 1938.

By its § 706 an Arrangement is defined as meaning

"any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts."

Mr. Remington (Remington on Bankruptcy, Fifth Edition, Volume 7, page 208, § 3072) gives a lucid summary of the nature of arrangement proceedings in the following:

"It must continually be borne in mind that arrangement proceedings under the Bankruptcy Act are primarily designed, not for the general administration of an insolvent's estate, as are the proceedings in bankruptcy but, rather, for *supplanting* or *preventing* such administration by effecting a settlement, or extension of the time of payment of a debtor's unsecured debts between a debtor and his creditors.

"Naturally, therefore, the first object of the arrangement proceedings, different from that of bankruptcy, is *not to place a representative of the creditors*, in the person of a trustee, in charge of the estate; but the creditors, at their first meeting, are merely privileged to nominate one who, thereafter, in the event the arrangement

proceedings collapse, shall be appointed by the court as trustee to liquidate the remaining assets and distribute their proceeds, in conformity with the provisions of the Act.” (Emphasis ours.)

It is further to be borne in mind that there are two quite different classes of debtors who are authorized to petition for an arrangement under the provisions of 11 USCA, §§ 701 et seq. The first class is that of the *bankrupt* debtor who offers a plan or seeks an arrangement in connection with his bankruptcy, either before or after he has been adjudicated a bankrupt (§ 721). In this class of cases a trustee in bankruptcy may already be in charge when the plan for arrangement is submitted by the debtor.

The other class seeking an arrangement consists of a debtor who is not bankrupt, but is temporarily embarrassed in that he is unable to meet his current obligations in due course (§ 722). Here, only a receiver can be appointed and then only *if necessary* (§ 732 supra). In such cases, the law makes explicit provision that the corporation, when authorized by the court, may continue to operate the business (§ 713). The nature of the petitioner’s possession under these circumstances is defined by § 742 as follows:

“Where no receiver or trustee is appointed, the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this title, subject, however, at all times to the control of the court * * *”

It will be noted that nothing in this statute constitutes an *appointment* of the debtor as a trustee or as a receiver. It merely defines the powers that the debtor may exercise. This section was construed by this Ninth Court of Appeals in *Urban Properties Corp. v. Benson*, 116 F. (2d) 321. In that case, the lessee had applied for an Arrangement under Title 11 and its landlord sought to cancel its lease by virtue of the following provision:

“If at any time during the term of this lease in any judicial action or proceeding a receiver or other *officer* or *agent* be appointed to take charge of the demised premises or the business conducted therein * * * the lessor shall have the right at their option immediately to terminate this lease.” (Emphasis ours.)

It will be noted that the language here was much broader than § 5831-4 in that it referred not only to a receiver but to any other *officer* or *agent*. This court held that the lessor had the right to terminate its lease upon the filing of the petition for an Arrangement, not on the provision respecting the appointment of receiver, which it declined to do, but upon the legal definition of the words “*officer* or *agent*.” This court quoted 11 USCA, § 1 (18) which states that the word “*officer*”

“ ‘shall include * * * custodian * * * and trustee and the imposing of a duty upon * * * any officer shall include his successor and *any person authorized by law to perform the duties of such officer*’ ” (Emphasis supplied by the court.)

The court then continues:

“The statutory continuance of a debtor in possession subject to the control of the court certainly creates the debtor ‘a custodian’ of the property under the court’s control and hence an ‘officer.’ * * * Undoubtedly he (the debtor) is a ‘court officer analogous to a receiver or trustee.’ In *re Wil-Low Cafeteria*, 2 Cir. 111 F. 2d 83, 84.

“However, whether or not the debtor is an officer within the provisions of Section 1 (22) [now subd. 18]), the authorization to conduct the business under the control of the court is to conduct it not as a free lessee, but as ‘agent’ for the court in its care of the interest of the creditors. In *re Avorn Dress Co.* D.C.N.Y., 11 F. Supp. 574. Lessee’s function as agent may be regarded as ‘analogous’ to a receiver in equity.” (Citing cases.)

In finally reaching the conclusion that the debtor who files a plan for an Arrangement is an “agent,” it is obvious that the court went as far as it felt it consistently could in defining the nature of the possession of the debtor. This is emphasized by the vigorous dissent of Judge Healy in this case.

To hold that the debtor is an agent, or that he is a court officer analogous to a receiver, is to fall far short of holding that the petition is an application for the appointment of a receiver or trustee, which the Washington statute (§ 5831-4) requires. Although not binding on this court, the comment on the conclusion of the court in the *Urban Properties* case, *supra*, made by District Judge Hall in the case

of *In re Burke*, 76 F. Supp. 5, 10 is interesting and strongly confirmatory of the view we have taken.

Can we, then, say that whenever an embarrassed debtor petitions the court for an Arrangement, it is applying for the appointment of a receiver merely by filing such a petition? True, under some circumstances, the court may, *if necessary*, appoint a receiver (§ 732). But appellee is careful not to allege that Chemurgy, or anyone else, ever asked for the appointment of a receiver for it during the pendency of the appellee's plan for an Arrangement. Appellee is equally careful not to allege that any receiver ever was appointed during the more than six months in which Chemurgy was seeking to carry out its plan. If Chemurgy had succeeded with its plan, it is clear that the court would at once have released Chemurgy from its obligations to the court and Chemurgy would have gone its way in the business world, conducting its business much as it had done before it petitioned for an opportunity to make an arrangement with its creditors.

On the contrary, then, when a corporation, in filing its petition for an Arrangement, is not bankrupt and no one asks for the appointment of a receiver, nor is one appointed, it is clear that its mere filing of a petition is not an application for the appointment of a receiver. It is rather the submission of a plan to its creditors through the Bankruptcy Court for the purpose of *avoiding* the appointment of a

receiver, for the purpose of avoiding a later bankruptcy. By so doing the debtor declares its belief that it can get on without the liquidating processes of receivership or bankruptcy and it is making the effort so to do.

Six months later Chemurgy found itself unable to consummate its proposed plan of arrangement. Appellee's complaint (paragraph 4) (Tr. 2-3) alleges that "upon a hearing duly noticed and held" the court then declared Chemurgy to be a bankrupt and for the first time in these proceedings ordered "that bankruptcy be proceeded with" pursuant to the terms of the Bankruptcy Act.

It was, then, the act of Chemurgy in proceeding under § 776 (2) on December 13, 1947 that became its application for the appointment of a receiver or trustee within the meaning of § 5831-4, Remington's Revised Statutes. If December 13, 1947 is the date when Chemurgy first applied for the appointment of a receiver or trustee in bankruptcy, we then find that the payment alleged to be made by Chemurgy to the appellant was made much more than four months prior to the application for appointment of receiver. This is fatal to appellee's right to recover.

Second: APPOINTMENT OF TRUSTEE IN BANKRUPTCY NOT MADE "PURSUANT TO" CHEMURGY'S PETITION FOR AN ARRANGEMENT. But, even if the court were to consider treating Chemurgy's petition for an Ar-

rangement as an application for the appointment of a receiver, because a receiver *might* have been appointed thereunder, still this could not satisfy the Washington statute.

It is to be noted that the Washington statute, § 5831-4 (see Appendix), is careful to define the term, "date of application," as meaning

"the date of filing with the clerk of the court of the petition or other application for the appointment of a receiver, *pursuant to which application* such appointment is made."

The complaint of appellee (Tr. 2-4) in explicit terms negatives the hypothesis that this appointment of trustee in bankruptcy was made *pursuant* to the filing of a Petition for an Arrangement. To the contrary, the complaint (see paragraph 4) (Tr. 3) in effect alleges that the appointment was made when and only when Chemurgy was unable to consummate the proposed Arrangement. Then

"upon a *hearing* duly noticed and held pursuant to section 376 (2) of the Act of Congress relating to Bankruptcy, said court on December 13, 1947 duly made and entered its order that Chemurgy is a bankrupt under said Act and that bankruptcy be proceeded with pursuant to the provisions of said Act."

These allegations make it manifest that it was pursuant to the hearing held after Chemurgy was unable to consummate the settlement which led to the order declaring that Chemurgy was a bankrupt

and that the later appointment of the trustee was likewise made "pursuant to" this hearing and order of December 13, 1947, not of the Petition for an Arrangement of May 29, 1947.

In other words, the Washington statute under which appellee sues (see Appendix) is careful to raise two separate tests by which the petition of the insolvent corporation must be tried. These two tests are

(a) the petition must be an application for the appointment of a receiver and,

(b) it must also be an application pursuant to which the appointment of a receiver is made. .

We have seen that the application of Chemurgy for an Arrangement in no way complies with either of these two tests. Therefore, this failure to comply is fatal to appellee's assertion of a right to recovery.

Third: APPELLEE'S SUIT NOT BROUGHT IN TIME. There is another reason (raised by our 4th assignment of error) seen by us as equally conclusive why appellee cannot recover. The same Washington statute (§ 5831-5, R. R. S.—See Appendix) which permits recovery of preferential payments only when made within four months of the date of application for receiver, also makes it a condition precedent that the suit to recover the preferences

“may be commenced at any time *within but not after* six (6) months from the date of application for appointment of such receiver.” (Emphasis ours.)

A mere reading of this statute demonstrates that it is not a statute of limitation but a conditional grant of right to sue. The right does not come into existence unless the suit is brought within six months from the date of application for the appointment of a receiver. Thus, when appellee brought his suit on May 28, 1948 one day short of a full year after the date of an application for an Arrangement which was on May 29, 1947, he had no right on which to sue.

(a) *State Supreme Court holds § 5831-5 not to be a statute of limitation.* This statute has been construed exactly as we contend by the State of Washington. In *Morris v. Orcas Lime Co.*, 185 Wash. 126, 53 Pac. (2) 604, the Supreme Court of Washington was considering the effect of a slightly altered variation of the present statute (see § 5831-1, R. R. S., Laws '31, p. 160 §1). The court there said:

“The limitation is not one that goes to the remedy of a defendant like the ordinary statute of limitation, but it goes to the cause of action or right to sue. The time prescribed—six months from the time of filing the application for appointment of trustee for the commencement of the action—is a *condition* to the enforcement of the liability or the trustee's right to recovery, *an element in the right itself*. The right falls with the failure to commence the action within the allotted time.” (Emphasis ours.)

The slight verbal change made by the statute of '41 in no wise affects the application of this decision although the change does strengthen the position of the court.

In the court below appellee laid emphasis on the hardship of only six months within which to sue, pointing out that he was not appointed until more than six months after the application for an Arrangement made by the bankrupt. But that precise hardship contention was later made to the Supreme Court of Washington in the case of *Peeples v. Hayes*, 4 Wash. (2) 253, 256, 104 Pac. (2) 305 and answered effectively by Judge Robinson who strictly adhered to the doctrine of the Morris case *supra*, saying,

“The ordinary statute of limitation is enacted for the benefit of those against whom claims are made; that is, for the benefit of defendants. It in no way affects the plaintiff's right, and gives the defendant a privilege only, which privilege may be exercised or waived at defendant's option. On the other hand, the limitation provided by § 5831-1 is a *condition* of the plaintiff's asserted right and the absence of allegations showing that the action has been commenced within the period limited renders his complaint demurrable for want of facts.”

(b) *Federal decisions strictly to same point.* Our position is fully sustained by *In re Appalachian Publishers*, 29 Fed. Supp. 1021. There, a trustee in bankruptcy sued to recover usurious interest under a federal statute which doubled the amount *if sued upon* within two years of the time of the usurious

transaction. The bankruptcy trustee sued later than two years after the transaction but within two years of the filing of the petition in bankruptcy. Thus, if the bankruptcy statute of limitation controlled, he was in time; if the condition precedent of the usurious statute controlled, he was too late. The trustee contended, as does this plaintiff, that the bankruptcy limitation was paramount. The court said:

“But for the statute relied upon here, there would be no cause of action, and in that statute the condition to the right or liability is as clear as the creation of the right itself. Reliance upon the statute by the trustee requires the acceptance of the conditions to existence of the right as well as the parts of the statute defining the right and conditioning its existence on the proviso respecting the time within which it exists.” * * *

“I conclude the statute of limitations carried into the Bankruptcy Act must be held to be strictly a statute limiting the time within which rights may be enforced, and *not a statute* undertaking to *strike down* in *another* statute a condition imposed therein as essential to the existence of the right itself.” (Emphasis ours.)

The same question was raised in *Charlesworth v. Hipsh*, 84 Fed. (2) 834, 837 (8th Cir.), Cert. denied 299 U. S. 594. The court there said:

“Counsel discuss this situation as if the 90-day period were a provision found in an ordinary statute of limitation, and contend that it was tolled by the order of the bankrupt court directing the trustee to take charge of the Davis Company’s assets on February 24, 1932. In this view they are in error. Here the right and the

remedy are both created by the bulk sales law. The limitation of the remedy is a limitation of the right as well as of the liability. Time is made by the law of the essence of the right. When, therefore, the 90-day period expired the rights of creditors against the vendee likewise expired."

Can the appellee take advantage of the Washington statute and at the same time strip it of the very condition that gives him the right to sue? To state the question is to answer it in the negative.

(c) *Text and decisions applying rule to other statutes of like character.* It is plain from the language of § 29e, on which appellee must rely, that it goes no farther at the most than to extend a "period of limitation" fixed by federal or state law. Statutes of limitation such as this seeks to extend are merely statutes of repose and are procedural in nature. The difference between the ordinary statute of limitation and qualifications attached to a given statutory right, such as exists in the Washington statute (§ 5831-5), is well expressed in the following text:

"A wide distinction exists between pure statutes of limitation and special statutory limitations qualifying a given right in which time is made an essence of the right created and the limitation is an inherent part of the statute or agreement out of which the right in question arises, so that there is no right of action whatever independent of the limitation; a lapse of the statutory period operates, therefore, to extinguish the right altogether. To such limitations

the rules of law governing pure statutes of limitation, applicable to all classes of actions, have no application; they are to be determined by the law of the place under which the right of action arose or the contract was made and are not to be treated as waived merely because they are not specially pleaded. They are not subject to the disabilities and excuses through which the effect of ordinary statutes of limitation may be avoided, nor, it seems, may they be evaded even by proof of fraud.

“Whether a particular limitation of time is to be regarded as a part of the general statute of limitations or as a qualification of a particular right must be determined from the language employed and from the connection in which it is used.” (53 C.J.S. 904 § 1(2) (c))

It is manifest that § 29e has no language appropriate or adequate to describe such “a condition,” such “an element in the right itself,” as the Washington Supreme Court has aptly described it. Ought, then, this Court to extend the language of § 29e by latitudinarian construction to cover this so different situation?

It is plain that such an extension would distort the state statute. It would make it mean something quite different from what its authors intended. It would destroy a basic element in this limited right, and create a right of different characteristics from the right set up in the statute.

On the other hand, there is no need to distort the Washington statute or to add a new and different provision to § 29e of the Bankruptcy Act. The Bank-

ruptcy Act itself creates its own definition of what constitutes a recoverable preference. If this appellant has received a preference, appellee has an adequate remedy under the Bankruptcy statute itself without resorting to the state statute and then demanding that the state statute be refashioned to fit the position in which appellee finds himself.

But if appellee disdains the Bankruptcy definition of preferential payments and finds it more convenient to use the state definition of preferential payments, he must take the state's definition *cum onere*. He cannot use that part of the state's definition which pleases him and reject the rest.

There was a time when federal courts pressed the dominance of federal statutes over state statutes and state policy to a degree no longer deemed appropriate. When Mr. Justice Brandeis wrote the decision of the U. S. Supreme Court in *Erie R. Co. v. Tompkins*, 304 U. S. 64, in which *Swift v. Tyson* was overruled after 95 years of almost constant application in the federal courts, that decision did more than adopt a rule of respect for state statutes and state judicial decisions.

In *Guaranty Trust Co. v. York*, 326 U. S. 99, 101 Mr. Justice Frankfurter gave voice to the change of trend of our federal courts when he said:

“In overruling *Swift v. Tyson*, 16 Pet. 1, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a *particular way of*

looking at law which dominated the judicial process long after its inadequacies had been laid bare."

The *Tompkins* and *York* cases, not otherwise in point here, are, as this court is aware, but a symbol of the many cases that in late years indicate the high respect the federal courts pay to state enactments, the great reluctance to alter their effect.

Such reluctance is especially applicable where

"plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a state-created right vitally and not merely formally or negligibly." (*Guaranty Tr. Co. v. York*, *supra*)

This statement precisely defines the difference between an extension of the mere statute of general limitation by a federal statute and one that alters vitally a state-created right.

This distinction between the ordinary statute of limitations, such as is the subject of § 29e, and a condition of the right that is contained in the heart of the act creating that right, has been made and applied in many cases, both state and federal, and under a variety of circumstances, as is indicated by the citations in 53 C. J. S., p. 904, attached to the quoted text, *supra*. We select but a few of these cases for illustration of the subject.

Thus, in *Ford, Bacon & Davis, Inc. v. Volentine*, 64 Fed. (2) 800, 802, in dealing with liability for injury, 5th C. C. A. says:

“While ordinarily the limitations of the forum are applied as pertaining merely to the remedy, there is an exception where the cause of action is created by a foreign statute which also fixes a limitation for its assertion. The limitation is then considered to be a condition of the right, so that no recovery is allowed where recovery would be barred by the law which gives the right.”

In *Western Fuel Co. v. Garcia*, 257 U. S. 233, 243, where the same issue arose in an admiralty case, the court quoted the following apt language of Mr. Chief Justice Waite (used by him in *The Harrisburg*, 119 U. S. 213, 214):

“The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the *essence of the right*, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.”

In *Vaughn v. U. S.*, 43 F. Supp. 306, 308 the distinction we urge is stated as follows:

“This provision of Section 19 is not, strictly speaking, a statute of limitation. The pure statute of limitation merely limits or restricts the time within which a right, otherwise unlimited, may be exercised. The provision is more or less in the nature of those special statutory limitations, which are in reality statutes of creation, in which time is of the essence of the right claimed and the limitation is an inherent part of the statute from which the right in question arises. To such limitations the rules which govern pure statutes of limitation do not apply.”

And, in *Wilson v. Ry. Co.*, 58 F. Supp. 844, 847, a large number of the cases are quoted from and cited sustaining this distinction in unqualified terms. The following excerpt is pertinent:

“In *Bell v. Wabash Ry. Co.*, 8 Cir., 58 F. 2d 569, 571, the Circuit Court of Appeals of this circuit, which at the time had under consideration Sec. 6 of the Federal Employers’ Liability Act, said:

“The limitation of said section as to time in which the action may be maintained clearly conditions liability, and enters into the right created as a substantial part thereof. It is not a mere statute of limitations pertaining to the remedy. If the action is not brought within the time provided, the right to proceed under the act is ended. In Judge Sanborn’s opinion in *Eberhart et al. v. United States, for Use of First Nat. Bank of Belle Fourche*, S. D. 8 Cir., 204 F. 884, 890, 891, he says: “An act of Congress, which at the same time and in itself authorizes or creates a new liability and prescribes the limita-

tions thereof and of its enforcement, makes those limitations conditions of the liability itself. Such an act is not a statute of limitations, and a compliance with the conditions which it prescribes is indispensable to the enforcement of the liability it authorizes or creates * * * because such limitations are conditions of the liability itself and not limitations of the remedy only.” * * *

‘In *American R. Co. of Porto Rico v. Coronas*, 230 F. 545, 546, L.R.A. 1916E, 1905, the Circuit Court of Appeals of the First Circuit, referring to the provision of the Federal Employers’ Liability Act, says: “The right granted exists only by virtue of the statute, and its scope and effect must be determined therefrom. * * * The bringing of the action, therefore, within the specified time, is a condition to the exercise of the right, and, if the condition is not complied with, the parties stand, with respect to the wrongful act, as though the statute had not been enacted. The limitation relates, not merely to the remedy, but to the right.” * * * ’”

That this principle still expresses the legal concept of our U. S. Supreme Court is illustrated by the quite recent restatement of it by Mr. Justice Black in *Garrett v. Moore-McCormick Co.*, 317 U. S. 239, 245, as follows:

“The constant objective of legislation and jurisprudence is to assure litigants full protection for all *substantive* rights intended to be afforded them by the jurisdiction in which *the right itself originates*. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or covered by state law [citing *Erie R. Co. v. Tompkins*, 304 U. S. 64].

“And admiralty courts, when invoked to protect rights *rooted in state law* endeavor to determine the issues in accordance with the *substantive law* of the State [citing *Western Fuel Co. v. Garcia*, 257 U. S. 233, 242].”

(d) *Trial Judge's Opinion—Sproul v. Gambone.* The learned trial judge's discussion of the distinction we here press upon the Court took rather a narrow range. At some length the trial judge, in his opinion (Tr. 7), vindicates the right of Congress under its powers to enact bankruptcy legislation, to affect substantive rights. That we do not deny. We say only, *if* Congress does intend to affect substantive rights, as distinguished from those of a mere procedural nature, that intent must appear in the legislation by express language.

To the contrary, a reading of § 29e plus a consideration of the records of the 74th Congress, Second Session, H. R. 8046 footnote (quoted in *Sproul v. Gambone*, 34 F. Supp. 441, 444), indicates clearly that Congress neither went nor intended to go farther than to deal with the ordinary statutes of limitation, essentially procedural in nature.

Having thus vindicated the power of Congress and assuming without demonstrating that Congress intended by § 29e to vitally affect rights “rooted in state law,” as Mr. Justice Black has put it, the able trial judge then selects alone the case of *In re Appalachian Publishers*, 29 F. Supp. 1021 to disagree with its conclusion, saying that

“I prefer the reasoning, *implicit* in *Sproul v. Gambone* [supra] that such a limitation does not prevent the genesis of the right, but *only makes provision* for its expiration when the *limitation has run.*” (Emphasis ours.)

In so saying the trial judge completely disregards the “wide distinction” between the ordinary statute of limitation and the statute-created right which contains within it the terms and conditions under which that right may be exceeded.

Such a statement ignores the declaration that such a condition to the existence of the right itself, as Mr. Chief Justice Waite said in *The Harrisburg*, supra, “is of the essence of the right.” It ignores the declaration of the Supreme Court of Washington construing the statute that this condition is “an element in the right itself.” It pays no heed to the opinion of the 8th Circuit in *Bell v. Railway Co.* (quoted above from the opinion in *Wilson v. Railway Co.*, supra) that

“such an act is *not a statute of limitations* and a compliance with the condition which it prescribes is *indispensable* to the enforcement of the liability it authorizes or creates.”

Passing from the trial judge’s opinion to the consideration of the case on which he relies, *Sproul v. Gambone*, supra, that opinion overlooks the decision of *In re Appalachian Publishers*, 29 F. Supp. 1021 and addresses itself exclusively to *Charlesworth v. Hipsh, Inc.*, 84 Fed. (2) 834, 835 as its sole antagonist. Judge Schoonover, in that case, criticizes the

cases cited by the Charlesworth decision as not supporting its text. True, they can be distinguished in their factual setting. But the principle of law each of these cited cases states is exactly the principle for which we here contend.

Sproul v. Gambone, supra, also finds fault with the holding in the Charlesworth case on the ground that its discussion of the law is dictum. Then, quite inconsistently, Judge Schoonover converts his own legal decision into dictum by saying, in conclusion:

“[8] Then, too, we are of the opinion that even though § 11 sub. e [§ 29e, 11 USCA] should be held not to apply to the instant case, yet the motion must be denied in view of the fact that plaintiff started proceedings in the bankruptcy court for an injunction and summary relief for the reclamation of this property within the 90-day period fixed by the Pennsylvania Act!”

Thus, Judge Schoonover realized, if the trial court did not, that he was at least treading on doubtful ground in holding that the 90-day condition in the Pennsylvania statute was “a state statute of limitation.”

V.

Conclusion

There are, then, three reasons, each fatal to the sufficiency of appellee's complaint for holding that the complaint of appellee does not state a cause of action.

First: Since, by its petition for an Arrangement filed May 29, 1947, 11 USCA, §§ 701 et seq., Chemurgy did not seek the appointment of a receiver, but rather sought to avoid such an appointment, the date of filing such a petition cannot be regarded as the date of "application for the appointment of a receiver," as required by § 5831-4, R. R. S. It then follows that any payments made within four months of May 29, 1947 cannot be regarded as preferential.

Second: Since no appointment of a receiver or trustee was in fact ever asked for, or made, under the petition of Chemurgy for an Arrangement but only when Chemurgy confessed to the Bankruptcy Court that it no longer hoped for an Arrangement, but must submit to be adjudged a bankrupt, then it must be held that the receiver or trustee was not appointed "pursuant to" the petition for an Arrangement, as required by § 5831-5, R. R. S., but that such appointment was made pursuant to this admission of Chemurgy of failure of its plan for an Arrangement. Since payments made to appellant within four months of May 29, 1947 cannot possibly be within four months of the date of December 13, 1947, when Chemurgy changed over from an applicant for an Arrangement to an applicant for bankruptcy, therefore, for this reason as well, appellee's complaint does not state a cause of action.

Third: Since the statute-created right to recover a preference under the law of the state of Washington has imbedded in it the condition that suit to

recover a preference must be commenced within, but not after, six months from the date of application for the appointment of a receiver, even though we accept the date of May 29, 1947 as such a date, nevertheless, appellee's complaint does not state a cause of action since this suit was commenced on May 28, 1948 but one day short of a year later.

For each of these reasons we respectfully submit that the judgment of the trial court should be reversed.

Respectfully submitted,

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APPENDIX

Remington's Revised Statutes

§ 5831-4. Words and terms used in this act shall be defined as follows:

(a) "Receiver" means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation.

(b) "Date of application" means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is made; or in case the appointment of a receiver is lawfully made without court proceedings, then it

means the date on which the receiver is designated, elected or otherwise authorized to act as such.

(c) "Preference" means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class.

§ 5831-5. If not otherwise limited by law, actions in the courts of this state by a receiver to recover preferences may be commenced at any time within but not after six (6) months, from the date of application for the appointment of such receiver.

§ 5831-6. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded.

In The United States Court of Appeals
For the Ninth Circuit

ELMER SCHNEIDMILLER,

Appellant,

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for
Northwest Chemurgy Cooperative, a Corpora-
tion, Bankrupt,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

FILED

AUG 2 1949

BRIEF OF APPELLEE

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In The United States Court of Appeals
For the Ninth Circuit

ELMER SCHNEIDMILLER, *Appellant,*

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ADOLPH W. ENGSTROM, Trustee in Bank-
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Appellee.

No. 12235

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLEE

JURISDICTION

District Court—

This was a plenary action by a trustee in bankruptcy to recover on behalf of creditors of the bankrupt estate, a payment to a former creditor, which was preferential and voidable under the laws of the State of Washington (Rem. Rev. Stat. §5831-4 and §5831-6, Appendix p. 1) (Complaint, Tr. 2-5). The district court had jurisdiction by virtue of §70(e)(3) of the Bankruptcy Act (11 U.S.C.A. §110(e)).

Circuit Court—

Final decision and judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, was entered as prayed for in the complaint on March 25th, 1949 (Tr. 27-28) and this court has jurisdiction of this appeal from said final decision of the District Court by virtue of Title 28, U. S. Code, §1291 (28 U.S.C.A. §1291).

STATUTES INVOLVED

Appellee brought his action pursuant to Rem. Rev. Stat. of the State of Washington, §5831-4 and §5831-6 (Laws of 1941, Chap. 103, §1 and §3) (Appendix p. 1).

Appellant relies on Rem. Rev. Stat. of the State of Washington, §5831-5 (Laws of 1941, Chap. 103, §2) (Appendix p. 2).

The court below held that Rem. Rev. Stat. §5831-5 is in any event superseded as to this action by §11e of the Bankruptcy Act (11U.S.C.A. §29(e) (Quoted at p. 41 of this brief).

The statute in effect immediately prior to said Rem. Rev. Stat. §§5831-4, 5 and 6 (Laws of 1931, Chap. 47, §1 and §2a and b) and the statute in effect immediately prior to said §11e of the Bankruptcy Act (§11d of the Bankruptcy Act of 1898, 30 Stat. 544, 549) will be referred to in this brief and are also set forth in the Appendix at pp. 2-3

OPINION BELOW

The District Court overruled and denied appellant's motion to dismiss by written opinion, *Engstrom v. DeVos*, 81 F. Supp. 854, which opinion was made applicable to this action (See 81 F. Supp. 860). Following the denial of said motion appellant by answer admitted all of the allegations of the complaint (Tr. 21) and judgment was entered as prayed for in the complaint (Tr. 27-28).

The contentions of appellant have been separately presented to and considered by three District judges

all of whom have had previous experience with respect to certain of the fundamental points here involved. Judge Sam M. Driver of the United States District Court for the Eastern District of Washington in sixteen cases sustained appellee's complaint on motions to dismiss (See Tr. 7-19, 81 F. Supp. 854). Upon a wholly separate consideration and prior to the publication of Judge Driver's opinion, Judge Lloyd L. Black of the United States District Court for the Western District of Washington, Northern Division, also overruled motions to dismiss in seven cases brought by the appellee herein upon complaints identical with the one here involved (Western District of Wash., Northern Division, Cause Nos. 2009, 2011, 2012, 2013, 2014, 2018, 2023). Judge James Alger Fee, acting upon identical allegations, sustained appellee's action in *Engstrom v. Atkins*, District Court of Oregon, Cause No. 4114, and entered judgment therein as prayed for in the complaint in May, 1949.

In all of these cases the points here involved were presented on brief and by extensive argument by many counsel, but the judges have been unanimous in sustaining appellee's cause of action.

As stated above, these judges have all had previous experience with respect to certain of the fundamental points here involved. Judges Black and Driver were previously judges of the State Courts of Washington and before that practiced for many years as lawyers in that state. In these capacities they, of course, were very familiar with the frequently invoked court made rule which has been applied in many Washington cases since *Thompson v. Huron Lumber*

Co., 4 Wash. 600, 30 Pac. 741, that payments made by insolvent corporations must be returned upon demand by a liquidating officer.

This rule was frequently invoked by Trustees in Bankruptcy to recover preferential payments and illustrative cases are *Williams, as Trustee v. Davidson*, 104 Wash. 315, 176 Pac. 334 and *Woods, as Trustee v. Metropolitan National Bank*, 126 Wash. 346, 218 Pac. 266. In the latter case the court stated:

“The principle on which the receiver based his action would seem to be well founded in law. Ever since the case of *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, this court has adhered to the doctrine that an insolvent corporation may not prefer its creditors; that, although an individual creditor may do so, even to the exhaustion of his property, the right does not exist in a corporation; that its property on insolvency becomes a trust fund for the benefit of all of its creditors to be equally and ratably distributed among them. *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. 810; *Benner v. Scandinavian American Bank*, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914-D 702; *Jones v. Hoquiam Lumber & Shingle Co.*, 98 Wash. 172, 167 Pac. 117; *Simpson v. Western Hardware & Metal Co.*, 97 Wash. 626, 167 Pac. 113; *Williams v. Davidson*, 104 Wash. 315, 176 Pac. 334.

“The foregoing citations announce the further rule, also, that, in an action or suit on the part of the receiver to recover as for an unlawful preference, it is not necessary that he show that the creditor, at the time of receiving the preference, had knowledge or reasonable cause to believe that the corporation was insolvent. See particularly,

Jones v. Hoquiam Lumber & Shingle Co., supra; Williams v. Davidson, supra.

“Nor were the rights of the parties changed in respect to the right to recover the payments as an unlawful preference by the transfer of the proceedings into the bankruptcy court. By §70e of the bankruptcy act, it is provided that the Trustee in bankruptcy may avoid any transfer by the bankrupt of his property which any creditor of the bankrupt might have avoided, and may recover the property so transferred from the person to whom it was transferred. That this section gives the trustee in bankruptcy a right of action to recover property transferred in violation of state law, and is not subject to the four months’ limitation of other sections (60b, 67e) of the Bankruptcy Act, was held by the Supreme Court of the United States in *Stellwagen v. Clum*, 245 U.S. 605.”

As stated in *Meier v. Commercial Tire Co.*, 179 Wash. 449 at 451, 38 P.(2d) 383 at 384, this court made rule has now been written into statute law.

The third District judge to whom these Chemurgy cases have been presented, Judge James Alger Fee of the Oregon District Court, wrote the opinion in *McBride v. Farrington*, 60 F. Supp. 92, which demonstrates that he had previously given great study to §11e of the Bankruptcy Act and the legislative and case history leading up to the enactment of section 11e.

STATEMENT OF THE CASE

Prior to answering, appellant had moved to dismiss appellee’s complaint on the sole ground that it failed to state a claim upon which relief may be granted.

As stated above, this motion was denied (Opinion of the Court, Tr. 7-19 Order, Tr. 20). By his answer appellant then admitted all of the allegations of appellee's complaint. Only issues of law are therefore presented and these are restricted by Rule of Civil Procedure 46 to the two objections made at the time findings and conclusions of law were entered, which were as follows (Tr. 26) :

"1. The filing of a petition for an arrangement under Chapter XI of the Act of Congress relating to Bankruptcy was not the filing of a petition for the appointment of a receiver within the meaning of Remington Revised Statutes of the State of Washington, §5831-4, and therefore the payment referred to in Paragraph 8 of the Findings of Fact herein was not made within the four (4) months period designated by Rem. Rev. Stat. §5831-6 and/or

"2. This action was not commenced within the six months' period designated in Rem. Rev. Stat. §5831-5."

On December 13, 1947, Northwest Chemurgy Cooperative, a Washington corporation, which will be referred to herein as "Chemurgy" was adjudicated a bankrupt by the United States District Court for the Western District of Washington, Northern Division. Within six months of said adjudication numerous complaints in identical form were filed by the Trustee in several district courts against those individuals and corporations who had failed to comply with appellee's demand that they return payments made to them by Chemurgy which they were required to return by the terms of Rem. Rev. Stat. of the State of Wash., §5831-4 and §5831-6.

The complaint herein being admitted, the undisputed facts as found by the court are as follows:

On May 29, 1947, Chemurgy filed a Petition for an Arrangement under Chap. XI of the Bankruptcy Act, in the United States District Court for the Western District of Washington, Northern Division. On said date said court entered an order accepting and approving the Petition as properly filed under said chapter. Chemurgy was unable to consummate the proposed arrangement and upon a hearing duly noticed and held pursuant to §376(2) of the Act of Congress relating to bankruptcy (11 U.S.C.A. §776(2)), said court on December 13, 1947, duly made and entered its order that Chemurgy was a bankrupt under said Act and that bankruptcy be proceeded with pursuant to the provisions of said Act. On January 6th, 1948, appellee Engstrom was duly appointed by said court as Trustee of the Estate of said bankrupt and on said date qualified and ever since said date at all times has been the duly appointed, qualified and acting Trustee of the estate of said bankrupt. Said Secs. 5831-4 and 5831-6 of Rem. Rev. Stat. of the State of Wash. (Laws of 1941, Chap. 103, Sec. 1 and 3) were in full force and effect at all times material to the action.

For at least four months immediately prior to May 29, 1947, the date on which said petition was filed, Chemurgy was unable to pay its debts in the ordinary course of business and was insolvent within the meaning of said statutes of the State of Washington. Within said four months' period Chemurgy being then in-

solvent, paid to appellant a total of \$4,766.03 upon an antecedent debt then past due and owing by Chemurgy to said appellant upon which appellant was entitled to no offset. The effect of such payment was to enable appellant to obtain a greater percentage of the indebtedness due to appellant than other creditors of the same class.

In his Statement of the Case appellant erroneously states (Appellant's Brief p. 2) :

"As expressly avowed in the complaint, the action is based upon a Washington statute (Sec. 5831-4-6, Rem. Rev. Stat.) (Tr. 3) * * *."

Appellee expressly relied on Rem. Rev. Stat., Sec. 5831-4 and Sec. 5831-6, and quoted these sections in his complaint (Tr. 3-4). He did not and does not rely on Sec. 5831-5 as stated in the foregoing quotation from appellant's brief. This section (Rem. Rev. Stat. §5831-5) is not the section which granted appellee the power to sue. This unequivocal power is granted by the plain words of Rem. Rev. Stat. §5831-6, reading as follows:

"§5831-6.—Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded."

Section 5831-5 invoked herein solely by appellant is, as hereinafter pointed out, obviously a limitation only in the specific instances set out in the section and the limitation is therefore applicable in any event only when the following two necessary conditions precedent are present:

- (1) There is no other limitation prescribed by any law on the bringing of an action under Rem. Rev. Stat. §5831-6; and
- (2) The action is one which has been brought in the State Courts of Washington.

SUMMARY OF ARGUMENT

1. The filing of a petition under Chap. XI of the Bankruptcy Act, was an application for a receiver (defined by Rem. Rev. Stat. §5831-4 to include a Trustee) within the meaning of Rem. Rev. Stat. §§5831-4 and 5831-6.

2. Appellee was appointed pursuant to said application within the meaning of Rem. Rev. Stat. §5831-4.

3. Rem. Rev. Stat. §5831-5 is not applicable to this action.

- (a) By reason of clause—"If not otherwise limited by law,"
- (b) By reason of clause—"actions in the courts of this state,"
- (c) By reason of §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)).

ARGUMENT

I.

Petition Under Chapter XI Was An Application for the Appointment of a Receiver Within the Meaning of Rem. Rev. Stat. §5831-4.

The lack of any merit in appellant's contention that the petition for an arrangement under Chap. XI was not an application for a receiver within the meaning of Rem. Rev. Stat. §5831-4 is indicated in part by the fact that neither of the counsel for appellant herein, either in their oral arguments or written briefs filed with the District Court ever made such a contention or referred to this point in any way. It seems obvious that it has been included as a point of objection only out of deference to one of the counsel whose case is controlled by this appeal (Tr. 29-33) who referred to this point in his memorandum filed with the District Court.

The District Court succinctly and properly held that the filing of this petition was the only petition or application ever filed pursuant to which the appointment of the Trustee was made and when the proposed plan of arrangement failed of accomplishment, adjudication and subsequent bankruptcy proceedings, including the appointment of a Trustee, followed as a matter of law. On this point the District Court stated (Opinion Tr. 10):

“The crucial event on which the reckoning of time is based as to both limitations is the filing of the application for the appointment of the trustee. The first inquiry in the present case, then, logically, should be whether the filing of

the petition for an arrangement was equivalent to an application for the appointment of the trustee within the meaning of the Washington Act. Section 376, Chapter XI, of the Bankruptcy Act (11 U.S.C.A., Sec. 776) provides that when an original petition for arrangement is filed and and the arrangement is not consummated, the court may, without any further pleading, adjudicate the debtor a bankrupt and carry on the bankruptcy proceedings in the usual way. The petition for arrangement, from its inception, serves the purpose of an alternative petition for adjudication. When the arrangement fails of accomplishment, adjudication and subsequent bankruptcy proceedings, including the appointment of a trustee, follow as a matter of course. The petition for arrangement is the only petition, or application, ever filed, pursuant to which the appointment of the trustee is made. In legal effect, it is the same thing as the application for the appointment of the trustee."

In his argument on this point (Appellant's br. 5) appellant states that the point "calls for a concise analysis of the "Arrangement" provisions of the Bankruptcy Act found in 11 U.S.C.A., §701 *et seq.*, contained in the Chandler Act enacted by Congress in 1938." That such analysis is necessary may be conceded, but appellant fails to do so concisely and overlooks many of the relevant sections of Chapter XI of the Bankruptcy Act. The relevant sections will be hereinafter referred to.

As stated by the District Court there is only one petition which brought about the appointment of the appellee and this was the petition filed on May 29,

1947. As contemplated by Chapter XI there are only two relevant pleadings in the bankruptcy file, said petition and the order of adjudication of bankruptcy and they are both referred to in the complaint. These pleadings show most graphically that what was contemplated by the state statute (Rem. Rev. Stat. §§ 3831-4 and 6) is exactly what took place with respect to this bankruptcy so far as application for and appointment of a liquidating officer is concerned. The state statute contemplates insolvency proceedings in many forms; it refers to "any receiver, trustee, common law assignee or other liquidating officer of an insolvent corporation" (Rem. Rev. Stat. §5831-4).

There was no other petition filed which invoked the jurisdiction of the court to appoint a trustee except the petition referred to in the complaint herein. Said petition is in all respects exactly like, with some additional elements, any other petition for bankruptcy. It includes schedules of assets and liabilities, it lists the creditors, it lists the executory contracts and other necessary data in all respects as required by the ordinary petition in bankruptcy proceedings. The petition brings the corporation under the arm of the court because it is insolvent. The corporation filing must be one which could become a bankrupt under Sec. 4 of the Bankruptcy Act. Notice goes out to all of the creditors immediately and everyone is immediately put on notice that the corporation is insolvent and cannot be dealt with in the ordinary way, and by filing the petition the corporation does invoke the jurisdiction of the court to appoint a trustee if the proposed plan which is included in the petition is

not accomplished. Such a petition of course alleges insolvency and invokes all of the provisions of Chapter XI of the Bankruptcy Act, as was done specifically in this case in which the petition concluded with the words:

“Wherefore, this petitioner prays that proceedings may be had on this petition in accordance with the provisions of Chapter XI relating to Bankruptcy.”

An examination of Chapter XI of the Bankruptcy Act, section by section, will show that it corresponds exactly in all respects to the initiation of an ordinary bankruptcy proceeding with this added element, that the corporation has a period in which to attempt to work out a program of arrangement with the unsecured creditors to avoid the final liquidating effect of bankruptcy, which is the alternative under the petition if the arrangement cannot be consummated.

Where the petition for an arrangement is not filed in a pending bankruptcy it is filed under Section 322 (11 U.S.C.A. §722) of the Bankruptcy Act.

Chapter XI, by the second section therein reads as follows:

“Sec. 302. The provisions of chapters I to VII, inclusive, of the Act shall, insofar as they are not inconsistent with or in conflict with the provisions of this chapter, apply in proceedings under this chapter. For the purposes of such application, provisions relating to ‘bankrupts’ shall be deemed to relate also to ‘debtors,’ and ‘bankruptcy proceedings’ or ‘proceedings in bankruptcy’ shall be deemed to include proceedings under this chapter. For the purposes of such

application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 322 of this Act, and the date of adjudication shall be taken to be the date of the filing of the petition under section 321 or 322 of this Act except where an adjudication has previously been entered." (11 U.S.C.A., §702)

Under Section 306 of Article II of said Chapter XI a debtor who may file a petition is defined as follows:

"(3) 'Debtor' shall mean a person who could become a bankrupt under Sec. 4 of this Act and who files a petition under this Chapter; * * *." (11 U.S.C.A., §706)

The corporation comes under the exclusive control of the court just as in the case of any bankruptcy. By §311 of the Bankruptcy Act it is provided:

"Where not inconsistent with the provisions of this Chapter, the court in which the petition is filed, shall for the purposes of this Chapter, have exclusive jurisdiction of the debtor and his property wherever located." (11 U.S.C.A. §711)

And by §312, the powers and duties of the court are provided for as follows:

"Where not inconsistent with the provisions of this chapter, the jurisdiction, powers, and duties of the court shall be the same—* * *

- (2) "Where a petition is filed under Section 322 of this act as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed." (11 U.S.C.A., §712)

Under §313 (11 U.S.C.A., §713) the court may permit the rejection of executory contracts, the sale of property and may enjoin suits.

By §322 (11 U.S.C.A., §722) the debtor files the petition under Chapter XI with the court which would have jurisdiction of a petition for its adjudication as a bankrupt. By §323 (11 U.S.C.A., §723) the petition must state that the debtor is insolvent or unable to pay its debts as they mature.

Sections 326, 327 (11 U.S.C.A., §§726 and 727) contemplate the possibility of immediate adjudication as a bankrupt under the petition in the event such bond as may be required by the court is not furnished. Said sections provide:

“Sec. 326. Where a petition is filed under section 322 of this Act, the court may, upon hearing and after notice to the debtor and to such other persons as the court may direct, order the debtor to file a bond or undertaking, with such sureties as may be approved by the court and in such amount as the court may fix, to indemnify the estate against subsequent loss there-to or diminution thereof until, in the event of the entry of an order of adjudication under this chapter, the entry of such order.

“Sec. 327. Upon failure of the debtor to comply with such order for indemnity, as prescribed in section 326 of this Act, the court may, after hearing upon notice to the debtor, the creditors' committee, if any has been appointed and to such other persons as the court may direct, either adjudge the debtor a bankrupt and direct that bankruptcy be proceeded with pursuant to the provisions of this Act or dismiss the proceed-

ings under this chapter, as in the opinion of the court may be in the interest of the creditors.”

By §331 (11 U.S.C.A., §731) the judge may, as he did in the instant case, refer the proceedings to a Referee.

By §333 (11 U.S.C.A., §733) power is given to appoint appraisers and to file under oath an inventory and appraisal of the property of the debtor.

By §334 (11 U.S.C.A., §734) the court must promptly call a meeting of creditors upon at least ten days notice and by §336 (11 U.S.C.A., §736) the Referee receives proofs of the claim and may allow or disallow them, examines the debtor or causes him to be examined and by §338 (11 U.S.C.A., §738) the creditors may appoint a committee and may nominate a trustee who shall thereafter be appointed by the court in case it should become necessary to administer the estate in bankruptcy as provided under Chapter XI.

In other words, the stage is completely set for ordinary bankruptcy proceedings subject only to the single determination as to whether the proposed plan will be consummated.

Another important provision is §341 (11 U.S.C.A., §741) which provides that when not inconsistent with the provisions of Chapter XI, the powers and duties of the officers of the court and their fees and the rights, privileges and duties of the debtor shall be the same as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition

under Chapter XI was filed. Said §341 provides as follows:

“Sec. 341. Where not inconsistent with the provisions of this chapter, the powers and duties of the officers of the court and, subject to the approval of the court, their fees, and the rights, privileges, and duties of the debtor shall be the same, where a petition is filed under section 321 of this Act and a decree of adjudication has not been entered in the pending bankruptcy proceeding, as if a decree of adjudication had been entered in such bankruptcy proceeding at the time the petition under this chapter was filed, or, where a petition is filed under section 322 of this Act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed.” (11 U.S.C.A., §741)

Again it is clear that practically everything proceeds on the basis of ordinary bankruptcy procedure subject only to the granting of an interim opportunity for the insolvent corporation to make an arrangement with its unsecured creditors.

And again by §352 (11 U.S.C.A., §752) rights, duties and liabilities are fixed as in the case of ordinary bankruptcy. Said §352 provides:

“Sec. 352. Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and all other persons with respect to the property of the debtor shall be the same, where a petition is filed under section 321 of this Act and a decree of adjudication has not been entered in the pending bankruptcy

proceedings, as if a decree of adjudication had been entered in such bankruptcy proceeding at the time the petition under this chapter was filed, or, where a petition is filed under section 322 of this Act, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed.”

Article X of said Chapter XI provides for the procedure which admittedly took place in the instant case, that is adjudication of bankruptcy when the proposed arrangement is not consummated. Section 376 of the Bankruptcy Act (11 U.S.C.A., §776) provides where the petition has been filed under section 322 (11 U.S.C.A., §722) as was done in this case as follows:

“Sec. 376. If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall . . .

“(2) Where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever, in the opinion of the court, may be in the interest of the creditors.”

It will be further noted that no other pleading or application of any kind is to be filed or is in any way contemplated by §376. The court acts pursuant to law by virtue of the original petition filed under §322, Chapter XI (11 U.S.C.A. §722) as it did in this case when it found it to be in the interest of creditors to adjudicate Chemurgy a bankrupt and directed that bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Act.

Upon the entry of such an order the proceeding is then conducted so far as possible in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed at the time a petition for an arrangement was filed. Section 378 (11 U.S.C.A., §778) provides as follows:

“Sec. 378. Upon the entry of an order directing that bankruptcy be proceeded with . . .

“(2) in the case of a petition filed under section 322 of this Act, the proceeding shall be conducted, so far as possible, in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this chapter was filed; and the trustee nominated by creditors under this chapter shall be appointed by the court, or, if not so nominated or if the trustee so nominated fails to qualify within five days after notice to him of the entry of such order, a trustee shall be appointed as provided in section 44 of this Act.”

Under the foregoing section the nomination and appointment of a Trustee follows as in the case of any ordinary bankruptcy proceeding.

In the filing of this action and in taking the positions which he has taken in the District Courts and in this brief, the appellee is proceeding strictly in accordance with the foregoing Section 378 which contemplates that the filing of a petition under Chapter XI shall be treated as if a voluntary petition for adjudication in bankruptcy had been filed and the corporation adjudicated bankrupt on the day when the original petition under Chapter XI was filed.

We have gone into these provisions under Chapter XI of the Bankruptcy Act to show that the original petition filed May 29, 1947 was the petition pursuant to which the trustee was appointed. If said petition was not an application pursuant to which appellee was appointed then the unreasonable conclusion must be reached that in any Chapter XI proceeding which ultimately results in the appointment of a trustee after adjudication, such appointment results without application of any kind, thus unnecessarily rendering nugatory the provisions of Rem. Rev. Stat. §§5831-4 and 5831-6.

Furthermore, if the filing of the petition under Chapter XI is not treated as an application within the meaning of Rem. Rev. Stat. §5831-4 then the purposes of the State act will be defeated in practically all Chapter XI cases for the reason that whether or not the proposed plan can be consummated will take at least four months in most cases to determine. (In the instant case it took over six months for such determination). Obviously no payments on old debts will be made and payments made by the corporation to creditors granting credit while

the corporation is operating under order of the court after the filing of the original petition under Chapter XI could in no event be deemed preferential or within the scope of the State Act, but rather as costs of administration. Therefore, if the four months period is to be deemed terminated only when it is finally determined that the proposed arrangement cannot be consummated rather than when the petition is filed there will in effect be no four months period as contemplated by Rem. Rev. Stat. §§5831-4 and 5831-6. The result is that the State Act will be applied where ordinary bankruptcy proceedings are originally initiated but cannot be applied where a proceeding under Chapter XI is first initiated. The construction of the relevant statutes as submitted by appellee and found by the District Courts results in a reasonable application of the State statutes herein involved in all bankruptcy proceedings whether initiated by ordinary bankruptcy or by Chapter XI petition. The State statutes here involved were passed in 1941 after the passage in 1938 of the provisions of the Federal Bankruptcy Act found in Chapter XI. The State statutes clearly provide for recovery by Trustees in bankruptcy and in the face of the Federal Bankruptcy Act the State legislature still provided that the four months' period antedates the filing of a petition which results in the appointment of a liquidating officer regardless of how long it may take to find out the result of the petition.

A consideration of the history of the provision for this four months' period will assist in its construction. The present statute (Rem. Rev. Stat.

§§5831-4 and 5831-6) superseded Chapter 47 of the Laws of 1931, §2 (See Appendix p. 2). Prior to the 1931 statute the return of preferential payments was required by court made law and there being no limiting statute other than the ordinary statute of limitations, payments made several years prior to insolvency proceedings might be recovered. The purpose in restricting collection from creditors who had received payments without notice of insolvency of the corporation from whom such payments had been received was stated in *Seattle Association v. GMAC*, 188 Wash., 635@637, 63 P.(2d) 359@360 wherein the court stated:

“As pointed out in *Meier v. Commercial Tire Co.* 179 Wash. 449, 38 P.(2d) 383 the obvious purpose of the legislature in enacting Chapter 47, Laws of 1931,

“* * * was to mitigate the harshness of the rule when applied to a creditor who in good faith and without knowledge of the insolvency has received a payment more than four months before the filing of an application for the appointment of a receiver’

“Upon re-examination of the statute *we are still satisfied that it is its sole and only purpose.* Clearly it is not intended as a codification of all the rules relating to the Trust Fund Doctrine built up by the decisions of this court prior to its enactment.” (Emphasis supplied)

It is clear therefore that the legislature determined that as a matter of policy a limited period of only four months should be substituted for the period of years in which a creditor receiving pay-

ments during such years might be required to return them. The legislature decided it would simply take four months of the normal course of business of the company and that would be the period during which payments received therein must be returned. In order to be practical about the matter, the legislature obviously fixed the date of the filing of the petition rather than the final appointment as the termination of the four months period because ordinarily with the publicity given to that type of proceeding normal functions will cease upon the filing of the petition. It has already been demonstrated that publicity and notice to all creditors is given upon the filing of a petition under Chapter XI just as in the ordinary bankruptcy proceeding. Notice goes out to all the creditors and the debtor comes under the arm of the court.

However, if the position of the appellant is adopted then the legislature has not only by the terms of the preference statute taken the former period of several years in which payments might be deemed preferences and squeezed it down to four months but in many cases it has eliminated the application of the Trust Fund Doctrine completely because as stated above it would ordinarily take at least four months to determine whether the petition under Chapter XI could be worked out, with the result that if the date of adjudication rather than the filing of the petition under Chapter XI is taken as the termination of the four months period then no preferences would be deemed to have occurred at all. The creditors are put on notice by the filing of the petition and

the proceedings taken thereunder, including notice to all creditors, that fairly apprises them that they can no longer deal with the corporation on the same basis as before and such payments as they have received in the preceding four months may have to be returned.

If appellant's contention is upheld then a flagrant misuse of Chapter XI proceedings may be adopted (which will be closed if appellee's position and the holding of the District Court is sustained). This is indicated when consideration is given to the facts in the instant bankruptcy. While in this case we make no charge of bad faith, nevertheless, the facts exist, which may be taken as an example of the possibilities, that a number of the larger payments sought to be recovered including some of those made to defendants listed on page 30 of the transcript were made to directors of the corporation during the four months antedating May 29, 1947. Said directors participated in initiating the Chapter XI proceedings. If directors can thus initiate proceedings under Chapter XI and hold such proceedings before a district court for a period of four months they can, under appellant's contention, free themselves from the necessity of returning payments which they should have returned if ordinary bankruptcy proceedings had been initiated at the time Chapter XI proceedings were begun.

The position of appellee closes the door to such misuse of Chapter XI, squares with the history and purpose of the State statute, is fair to all concerned

and provides for a full field of action both for the State statute and the Federal Bankruptcy Act.

On the other hand appellant's contention is squarely met by the provisions of Chapter XI which clearly provides that the filing of a petition thereunder may result in adjudication of bankruptcy and appointment of a Trustee *as a matter of law*. Appellant's contention also fails to square with the purpose of the State legislation providing for said four months' period and if adopted provides a method for directors or other persons in control of a corporation to defeat, through the use of the Chap. XI proceedings, the right of a liquidating officer on behalf of creditors to recover preferential payments under the State statute.

In conclusion on this point therefore, it is submitted that so far as this case is concerned the "date of application" referred to in Rem. Rev. Stat. §5831-4 is the date on which the original petition under Chap. XI of the Bankruptcy Act was filed, that is, May 29, 1947 and of course it is admitted that the payment here involved was made by Chemurgy while insolvent within the four months prior to said date.

II.

The Petition Under Chap. XI Was An Application Resulting in the Appointment of Appellee and Pursuant to Which He Was Appointed Within the Meaning of Rem. Rev. Stat. §5831-4.

The complaint in this case and the findings of the Court (Tr. 2-3 Tr. 22-23) show that the adjudication of bankruptcy and the resulting appointment

of appellee followed as a matter of law from the petition of May 29, 1947. It is true of course that the appointment of appellee as trustee was made when Chemurgy was unable to consummate the proposed arrangement but nevertheless the appointment followed as a result of and pursuant to the original petition for there was no other pleading of any kind on file and it was this petition which gave the court jurisdiction to proceed. The error of appellant is emphasized by his statement:

“It was, then, the act of Chemurgy in proceeding under Sec. 776 (2) on December 13, 1947 that became its application for the appointment of a receiver or trustee within the meaning of Sec. 5831-4, Rem. Rev. Stat.” (Appellant’s br. 10)

There is no allegation in the complaint or any finding that Chemurgy proceeded in any way whatsoever on December 13, 1947 or prior thereto except by the filing of its petition on May 29, 1947.

§376(2) of the Bankruptcy Act (11 U.S.C.A., §776(2)) referred to in the complaint and findings makes it quite clear that the adjudication and subsequent bankruptcy proceedings all stem from the original petition and when the plan fails the court, as a matter of law, is required to take action under the original petition either for adjudication or dismissal of the proceedings. Said §376 of the Bankruptcy Act provides:

“Sec. 376. If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if

the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall * * *

“(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors.”

As stated by the District Court in his opinion (Tr. 10):

“The petition for arrangement, from its inception, serves the purpose of an alternative petition for adjudication. When the arrangement fails of accomplishment, adjudication and subsequent bankruptcy proceedings, including the appointment of a trustee follow as a matter of course. The petition for arrangement is the only petition, or application, ever filed, pursuant to which the appointment of the trustee is made. In legal effect, it is the same thing as the application for the appointment of the trustee.”

The State statute certainly contemplates that an “application” of some kind be made. Nowhere in his brief does the appellant point out any fact to sustain a contention that under the provisions of Chap. XI or the facts of this case any application was contemplated or made other than the original

petition under Chap. XI. Certainly the hearing held December 13, 1947 and the order of adjudication entered that day were not applications for they followed as a matter of law from the petition filed May 29, 1947 which, by its legal effect and its terms prayed that proceedings may be had upon the petition in accordance with the provisions of Chap. XI of the Act of Congress relating to bankruptcy. The petition in fact stated:

“Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance with the provisions of Chapter XI of the Act of Congress relating to bankruptcy.”

As noted above, one of the proceedings under Chapter XI of the Bankruptcy Act which results when the arrangement cannot be consummated is the adjudication of bankruptcy (§376 of the Bankruptcy Act, 11 U.S.C.A., §776) and an order that bankruptcy be proceeded with pursuant to the general provisions of the Bankruptcy Act which of course includes the appointment of a trustee.

No reason is stated by appellant why the petition filed May 29, 1947 should not be deemed an application resulting in the appointment of appellee and appellant cites no authority in support of such contention. The point is without merit and was not even made a basis of objection at the time the District Court entered his findings and conclusions as required by Rule of Civil Procedure 46 (See Tr. 26).

As found by the District Court in its opinion (Tr. 10) the petition under Chap. XI was an application for a “receiver” within the meaning of Rem. Rev.

Stat. §5831-4 and when this holding is confirmed by this Court it must follow, as a matter of law, that appellee was appointed pursuant to said application for no other document, petition or application gave the bankruptcy court jurisdiction to appoint appellee as trustee except said original petition which, by the terms of §376(2) of the Bankruptcy Act (11 U.S.C.A. §776(2)) authorized the court under the circumstances of this case to proceed as in the case of ordinary bankruptcy.

III.

Section 11 E of the Bankruptcy Act and Not Rem. Rev. Stat. §5831-5 Provided the Applicable Period for the Commencement of This Action.

(a) Rem. Rev. Stat. §5831-5 not applicable.

Appellant contends that this action must fail because not brought within six months from the date of the application resulting in appellee's appointment and appellant bases his argument on this third and last point solely on Rem. Rev. Stat. §5831-5 quoted in the Appendix at p. 2.

This statute is not applicable for the following reasons:

a. By its terms Rem. Rev. Stat. §5831-5 applies only to actions filed in the courts of the State of Washington.

b. By its terms Rem. Rev. Stat. §5831-5 applies only when there is no other time limitation on the bringing of an action under Rem. Rev. Stat. §5831-6.

c. In any event, the statute, if applicable, is super-

seded by §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)) quoted herein at page 41 which provided a period of two years subsequent to the date of adjudication of bankruptcy in which to commence this action.

Before discussing the several points just listed we pass to a consideration of the purpose of Rem. Rev. Stat. §5831-5. In construing the predecessor section in the 1931 Act (Appendix page 2) the court in *Peebles v. Hayes* 4 Wn.(2d) 253@257, 104 P.(2d) 305@307 held that the six months' limitation was not enacted for the purpose of aiding defendants but primarily for the benefit of creditors of the insolvent estate to avoid unreasonable delay in the recovery of preferences. The court stated:

“Furthermore the limitation is not for the benefit of those against whom actions are brought, but it is primarily for the benefit of the creditors of the insolvent corporation on whose behalf the action is prosecuted. Its primary purpose is to insure that their rights in the trust fund will be enforced promptly and without unreasonable delay.”

So this statute, which, under the interpretation given by the Supreme Court of the State of Washington is created simply as a shield for the creditors represented by the trustee would now be turned (if the appellant's interpretation is adopted) into a sword to strike down the right granted by Rem. Rev. Stat. §5831-6. As a practical matter there is of course no unreasonable delay if actions for the recovery of preferences are not brought during the pendency of Chapter XI proceedings. It is not feasible to go

around hat in hand asking creditors to approve a proposed plan of arrangement and at the same time meet them in the court house to sue them for the return of a preference. §391 of the Bankruptcy Act (11 U.S.C.A. §791) shows that Congress realized actions for the recovery of preferences or fraudulent transfers would not and should not be brought during the pendency of a Chapter XI proceeding because by this section the time for bringing such actions is suspended. This section provides:

“Sec. 391. All statutes of limitation affecting claims provable under this chapter and the running of all periods of time prescribed by this Act in respect to the commission of acts of bankruptcy, the recovery of preferences and the avoidance of liens and transfers shall be suspended while a proceeding under this chapter is pending and until it is finally dismissed.”

To urge, as appellant in support of this point must urge, that an action should have been brought during the pendency of the Chapter XI proceedings to recover this preference is unreasonable. Furthermore in an involved bankruptcy proceeding it takes a great deal of time to assemble the data upon which to make demand for the return of numerous preferences and then to commence actions against those of the creditors who do not respond to these demands. In the instant situation all of the actions for preferences, including the one here on appeal, were served and filed well within six months from the date of adjudication. In view of the pendency of the Chapter XI proceedings appellee was certainly prompt in this case and of course he in no event could have brought

the action within six months from May 29, 1947 as the corporation was not adjudicated bankrupt until December 13, 1947—more than six months after the filing of the petition and appellee's appointment was not made in said proceeding until January 6th, 1948. This action was served and filed within six months from said adjudication (Tr. 6).

Furthermore, Rem. Rev. Stat. §5831-5 cannot be applied, in any event, unless this action is clearly within its scope. In construing the preceding 1931 statute (relating to the recovery of preferences) (Appendix p. 2) the Supreme Court of Washington in *Seattle Association v. GMAC*, 188 Wash. 635 @640, 63 P.(2d) 359@361, stated:

“The statute is one modifying the common law of this state. *Sterrett v. White Pine Sales Co.*, 176 Wash. 663, 30 P.(2d) 655. Such being its purpose, it will not be construed in derogation of the common law beyond its plain intent and scope.”

Under the common law existing prior to the enactment of these preference statutes there was of course no limitation upon the commencement of actions to recover preferences.

Rem. Rev. Stat. §5831-5 being in derogation of the common law and not applicable unless an action is plainly within its intent and scope cannot be applied, in any event, to this case unless the words therein “*If not otherwise limited by law*” and “*actions in the courts of this state*” are both completely read out of the statute. This cannot be done because it is a cardinal rule of statutory construction that

effect is to be given to every word in the construction of statutes:

“It is presumed that the words were used with reference to the subject matter of the act, *that some effect is to be given to each*; that no exceptions are to be made to general language.” 59 C.J. 1012 (Statutes—Presumptions to Aid Construction) (Emphasis supplied)

Clause—“If not otherwise limited by law * * *.”

As to the first clause in Rem. Rev. Stat. §5831-5, “If not otherwise limited by law,” the intention of the legislature seems clear. It was enacting into statutory law a principle (trust fund doctrine) previously found only in decisions of the courts of this state. It desired to include a limitation on the bringing of preference actions but to impose such limitation *only in those cases in which there was no other limitation imposed by law with respect to the time in which such suits might be brought*. Furthermore, these words were placed in the Washington statute in 1941, three years subsequent to the enactment in 1938 of the Bankruptcy Act in its present form which includes the two year limitation on trustees in bankruptcy as the commencement of actions provided for in 1938 by §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)). Much of the language in the Washington statute (Rem. Rev. Stat. §5831) is taken directly from similar provisions in the Federal Bankruptcy Act, and it must be presumed that the legislature knew of the Federal Bankruptcy Act and that the legislature could not impose a limitation binding on a trustee in bankruptcy when, as here-

inafter demonstrated, the power of Congress under the bankruptcy provisions of the Federal Constitution is sufficient to override and strike down state statutes inconsistent with federal bankruptcy provisions.

“Numerous presumptions have been indulged in by the courts as aid in the construction of statutes. Thus, it has been presumed * * * *that the legislature acted with a full knowledge of the constitutional scope of its power* * * *”. 59 C.J. 1008 (Statutes—Presumptions to Aid Construction) (Emphasis supplied)

This clause had not been included in the 1931 statute (Appendix p. 2) and was a condition added by the State legislature in 1941 at the time the 1931 statute was repealed and the 1941 legislation (Appendix p. 1) took its place. On this point of legislative purpose we quote *Graffell v. Honeysuckle*, 30 Wn.(2d) 390, 191 P.(2d) 858, in which the court at page 399 stated:

“In construing statutes which re-enact, with certain changes, or repeal other statutes, or which contain revisions or codifications of earlier laws, resort to repealed and superseded statutes may be had, and is of great importance in ascertaining the intention of the legislature, *for where a material change is made in the wording of a statute, a change in legislative purpose must be presumed. In re Phillips Estate*, 193 Wash. 194, 74 P.(2d) 1015 and cases therein cited; *Great Northern R. Co. v. Cohn*, 3 Wn.(2d) 672, 101 P.(2d) 985; *Longview Co. v. Lynn*, 6 Wn.(2d) 507, 108 P.(2d) 365.” (Emphasis supplied)

In failing to hold with appellee on this point, Judge

Driver simply suggested that the reason for the inclusion of this clause was to leave room for the operation of the four-months period referred to in Rem. Rev. Stat. §5831-6 (Tr. 11). We submit, however, that the clause "If not otherwise limited by law" has no possible application to said four-months period. The subject matter of Rem. Rev. Stat. §5831-5 is the period in which *under certain circumstances* an action may be brought in the state court to recover preferences as defined in other sections of Chapter 103 of the Laws of 1941. Rem. Rev. Stat. §5831-6 has no possible implication with respect to the time for commencing an action but simply defines the four months period in which payments shall be deemed preferential. The subject matter of the two time periods (referred to in Rem. Rev. Stat. §5831-5 and §5831-6) is so dissimilar as to have no possible application to each other.

This clause, "If not otherwise limited by law", is plain and unequivocal and can be given meaning in accordance with its literal terms which are, in effect, that Rem. Rev. Stat. §5831-5 is applicable only *if there is no other limitation of time* binding on the liquidating officer acting under the preference statute which limits the plaintiff in the commencement of his action. In the instant case, such a limiting statute exists in §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)) which statute was in effect when the Washington legislature enacted Rem. Rev. Stat. §5831-5.

Another reason why the suggestion of Judge Driver referred to above is not applicable is that

since this clause was included in the 1941 act when it was not included in the 1931 act, it must be presumed that a departure from the former law was intended, and such a departure would not have been effected under Judge Driver's suggestion since a four-months period had been included in the 1931 statute and the clause "If not otherwise limited by law" was not included in the 1931 statute. This presumption that a departure from the old law was intended is emphasized in *Graffell v. Honeysuckle*, 31 Wn.(2d) 309@400, 191 P.(2d) 858, in which the court stated:

"The following statement, taken from 50 Am. Jur. 261, Statutes, Sec. 275, expresses the general attitude of the various courts in construing amendatory statutes:

" 'In making material changes in the language of a statute, the legislature cannot be assumed to have regarded such changes as without significance, but must be assumed to have had a reasonable motive. Where a statute is amended, it will not be presumed that the difference between the two statutes was due to oversight or inadvertence on the part of the legislature. To the contrary, the presumption is that every amendment of a statute is made to effect some purpose, and effect must be given the amended law in a manner consistent with the amendment. The general rule is that a change in phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended, and amendments are accordingly generally construed to effect a change, particularly where the wording of the statute is radically different.'

“See, also, 59 C.J. 1097, Statutes, Sec. 647.”

The most reasonable interpretation is that the State legislature added this clause because of §11(e) of the Bankruptcy Act which was added in 1938 and the legislature wanted no intimation of conflict with this Federal Statute which provided a limitation on the bringing of preference actions by trustees in Bankruptcy.

The reasoning upon which Rem. Rev. Stat. §5831-5 must be held not applicable to this action is as follows:

1. The phrase “If not otherwise limited by law” refers to a limitation upon the time for commencing an action to recover preferences under the Washington statute.

2. §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)) (quoted on p. 41 of this brief) provides a limitation of time in which this action may be brought.

3. A limitation in time having been provided by law, the condition precedent to the application of §5831-5 is not present and said section is not controlling or relevant in this case.

Clause—“* * * *actions in the courts of this state* * * *.”

As to this clause the legislature must be presumed to have known the fact that many cases have been brought under state preference statutes and principles (including the Washington trust fund doctrine) in federal courts. Furthermore, it is obvious that a creditor having received a preference cannot escape

the obligation to return it simply by removing himself from the state in which he received it and that actions would have to be brought in other states or in federal courts. The simplest situations will usually arise in common law assignments or state receiverships where the receiver ordinarily sues in the Washington state court and is not burdened with the many duties imposed by the Bankruptcy Act and General Orders on trustees in bankruptcy or the difficulties of foreign litigation, and the state legislature has chosen to restrict the harsh limitation of six months to the field of cases brought in the Washington state courts.

But whatever the reason may be, there can be no escape from the plain fact that the legislature chose to restrict the application of Rem. Rev. Stat. §5831-5 to actions filed in the courts of the State of Washington. And to apply §5831-5 to an action in other courts would require a re-writing of, and deletion from, the statute as enacted by the legislature.

As noted above, to extend the statute to situations not clearly and explicitly covered would be contrary to the construction of the similar preceding 1931 statute by the Supreme Court of Washington in *Seattle Association v. GMAC*, 188 Wash. 635@640, 63 P.(2d) 359, wherein the court stated:

“The statute is one modifying the common law of this state. *Sterrett v. White Pine Sales Co.*, 176 Wash. 663, 30 P.(2d) 665. Such being its purpose, it will not be construed in derogation of the common law beyond its plain intent and scope.”

The plain intent and scope of Rem. Rev. Stat. §5831-5 is restricted to "actions in the courts of (Washington)".

This statute (Rem. Rev. Stat. §5831-5) is not the statute which granted appellee the power to sue. This unequivocal power is granted by the plain words of Rem. Rev. Stat. §5831-6 reading as follows:

"Any preference made or suffered within four months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four-months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preferences made beyond such four-months' period are hereby specifically superseded."

Rem. Rev. Stat. §5831-5 provides a limitation only in the specific instances set out in its express terms and the limitation is applicable only when the two necessary conditions precedent are present:

a. *There is no other limitation prescribed by law on the bringing of an action under Rem. Rev. Stat. §5831-6; and*

b. *The action is filed in the state courts of Washington.*

Effect must be given to all words in a statute.

"It is presumed that the words were used with reference to the subject matter of the act, *that some effect is to be given to each*; that no exceptions are to be made to general language." 59 C.J. 1012 (Statutes—Presumptions to Aid Construction) (Emphasis supplied)

Judge Black held in his oral opinion, referred to above, overruling the motions to dismiss filed by those creditors of Chemurgy who resided in the Western District of Washington and who failed to return preferential payments, that Rem. Rev. Stat. §5831-5 was not applicable because the actions were not brought in the courts of the state of Washington.

The legislature of the state of Washington has demonstrated an unwillingness to extend further than to the exact situations defined in Rem. Rev. Stat. §5831-5, the severe and drastic limitation of six months into fields or circumstances where other limitations are established by law or to cases in courts other than the courts of the state of Washington. The legislature having thus failed to extend the statute, we submit that the courts should not so apply it, especially when the language of the statute is clearly restricted in application. The ease with which the restrictive provision might have been made applicable to all actions filed to recover preferences as defined by the state statute cannot be ignored in determining the intent of the legislature.

Finally it should be noted that the two cases cited by appellant with respect to Rem. Rev. Stat. §5831-5 were both decided prior to the enactment in 1941 of Rem. Rev. Stat. §5831-5 here discussed and were, of course, actions filed in the state court. The two clauses of Rem. Rev. Stat. §5831-5 here discussed were therefore not mentioned in either of the two cases cited by appellant, that is, *Morris v. Orcas Lime Co.*, 185 Wash. 126, 53 P.(2d) 604, or *Peeples v. Hayes*, 4 Wn.(2d) 253, 104 P.(2d) 305.

(b) The time for commencing this action was, in any event, governed by 11(e) of the Bankruptcy Act (11 U. S. C. A. §29(e)).

Section 11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)) provides as follows:

“A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the federal or state law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement, or in the proceeding or by applicable Federal or State law, as the case may be.”

All of the three District Judges above mentioned, in passing on the Chemurgy preference complaints, held that this §11e rather than Rem. Rev. Stat. §5831-5

governed the period of time in which action might be instituted by a Trustee in bankruptcy under Rem. Rev. Stat. §§5831-4 and 5831-6. The portion of Judge Driver's opinion on this point is on pages 13 to 17 of the transcript.

In the District Court appellant argued that Congress had no power to enact §11(e) so as to supersede limitations such as that contained in Rem. Rev. Stat. §5831-5. In view of the constitutional provisions quoted to the District Court and the many cases contained in appellee's briefs filed in the District Court and referred to in the District Court's opinion holding that under the bankruptcy provision of the Federal Constitution substantive rights may be affected by Congress, appellant has now abandoned his position that Congress had no constitutional power to enact §11(e) as construed by the District Court *and now relies solely on the contention that it was not the intention of Congress by the enactment of §11(e) to, affect substantive rights.* At page 23 of his brief appellant now makes the following admission:

“At some length the trial judge, in his opinion (Tr. 7), vindicates the right of Congress under its power to enact bankruptcy legislation to affect substantive rights. That we do not deny.”

By Article I, Sec. 8, Clauses 4 and 18 of the Federal Constitution it is provided:

§8, Powers of Congress—

“The Congress shall have power, * * *

To establish an uniform rule on naturalization; and uniform laws on the subject of bankruptcies throughout the United States; * * *

“To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States or in any department or officer thereof.”

The Federal Congress acting pursuant to the foregoing constitutional power enacted §11(e) of the Bankruptcy Act (11 USCA 29(e)). The broad language of §11(e) indicates clearly the purpose of Congress to set aside all time limitations on the bringing of suits by a trustee whether relating to right or remedy and for the protection of bankrupt estates and the uniform administration thereof to provide a uniform time limitation as laid down by Congress. As will be noted from the second sentence of the section, this section also deals not only with legal court actions but to all proceedings of every kind whether established by agreement or by State law, clearly evidencing the intention of Congress to supersede time limitations whether arising as a matter of procedure or as a matter substantive right.

Congress could have expressly restricted the field within which the two year limitation was to be operated had it so wished. Its failure to do so cannot be ignored.

Herget v. Central National Bank & Trust Co., 324 U.S. 4.

As was stated by the Supreme Court of the United States in *Herget v. Central National Bank & Trust Co.*, 324 U.S. 4, @ pages 7 and 8:

“Congress could have expressly restricted the field within which the two year limitation was

*to be operative had it so wished. Its failure to do so cannot be ignored * * *. Section 11(e) is not limited by its words to actions inherited by the Trustee; nor does it discriminate against actions by the trustee accruing to him under the act. It provides simply that the trustee must bring action on any claim in behalf of the estate within two years subsequent to the date of adjudication or within such further time as the Federal or State law permits, provided that such law did not bar the action on the date when the petition was filed."* (Emphasis supplied)

Obviously, all actions (except actions resting solely on the Bankruptcy Act and actions arising after adjudication in the course of bankruptcy administration) brought by a trustee must be deemed in the last analysis to be "inherited" either from the bankrupt or the bankrupt's creditors in the sense that the trustee either sues to recover money or property which the bankrupt could itself have recovered or he sues (as in the case of suits under the Washington Preference statute) to recover property which under some rule or law or statute has been obtained or held in violation of the rights of the creditors of the bankrupt estate.

But however the matter may be viewed it is obvious that the cause of action existed either by "inheritance" or by the terms of the Bankruptcy Act for the appellant does not contend on this point that there never was a cause of action to recover the amount herein sued for, but only that the time has elapsed in which suit may be brought. *Herget v. Central National Bank & Trust Co., supra*, speaks authoritatively on this point

and holds that §11(e) covers whether the action is inherited or not:

“Section 11e is not limited by its words to actions inherited by the trustee; nor does it discriminate against actions by the trustee accruing to him under the Act. *It provides simply that the trustee must bring action on any claim in behalf of the estate within two years subsequent to the date of adjudication or within such further time as the Federal or State law permits, provided that such law did not bar the action on the date when the petition was filed.*” (Emphasis supplied)

The history of the case and statutory law prior to the enactment of §11(e) demonstrates clearly that it was the intention and purpose of Congress to supersede all statutes and agreements which either as a matter of procedure or of substantive law might otherwise limit the time in which a trustee in bankruptcy might act on behalf of the bankrupt estate. Prior to the passage of the Chandler Act (52 Stat. 840) in 1938, Section 11(d) of the Bankruptcy Act of 1898 (30 Stat. 544, 549) (Appendix p.) barred actions brought by or against trustees subsequent to two years after the bankrupt estate had been closed. There was a difference between the various courts as to whether the former §11(d) (superseded by §11(e)) applied only to cases which could be brought solely because of the provisions of the Bankruptcy Act or whether §11(d) also applied to actions resting in whole or in part on State law. *In this controversy reliance was sometimes placed in rejecting the application of §11(d) on the fact that the time limitation*

was included in the State statute providing for the asserted right.

An example of a holding that the former §11(d) superseded state limitation statutes even when contained in the statute creating the right which the trustee sought to enforce is *In re Handy-Andy Stores of Louisiana, Inc.*, 51 F.(2d) 98. This case, decided in 1931, involved the Louisiana Bulk Sales Law which included a provision that:

“* * * provided further, that no proceeding at law or in equity shall be brought against the transferor to invalidate any such transfer after the expiration of ninety days from the consummation thereof.”

The court held the ninety-day limitation provision had been superseded by the two year period provided for in the former §11(d) of the Bankruptcy Act which was then in effect. The court stated:

“The bank has also plead the prescription of ninety days provided in section 3 of Act 270 of 1926. However, the chattel mortgage was dated February 20, 1929, and the petition for adjudicating the Handy-Andy Company a bankrupt was filed on April 22 of the same year, or within sixty-one days. Bankruptcy was resisted by the defendant, and some fifty other persons alleging themselves to be creditors intervened and joined in the demand that there be no application, among them being Roy B. McPherson, the mortgagee, who was then claiming to be a creditor for \$15,000, and numerous other creditors who were among those receiving payment out of the funds which had been realized from the loan now under consideration. Defendant was finally adjudged

bankrupt on June 20, 1929. The rights of all parties are determined as of the date of the filing of the petition for adjudication, whether voluntary or involuntary. Collier on Bankruptcy, (13th Ed.) vol. 1, pp. 657, 658, *et seq.*, and authorities in foot notes. If prescription has not run at that time for or against the bankrupt, the provisions of both State and Federal statutes are superseded by paragraph d of section 11 of the Bankruptcy Act, 11 USCA No. 29 (d) itself. See same authority, vol. 1, p. 425 *et seq.*, and authorities cited. So that I am of the view that the ninety-day provision of section 3 of Act 270 of 1926, of the state ceased to apply from the date of filing of the petition, and the trustee had the time allowed by section 11 of the Bankruptcy Act (11 USCA No. 29) in which to make an attack upon the mortgage.”

The former conflict between the courts in the interpretation of §11(d) is discussed in detail in *Issacs v. Neece* (CCA 5th) 75 F.(2d) 566 and is illustrated by the cases listed in Footnote 4 to *Herget v. Central National Bank & Trust Co.*, 324 U.S. 4, 89 L. ed. 656.

The purpose of the enactment of §11(e) in 1938 was to set at rest all of this controversy and dry up the previous well of uncertainty. If the argument of the appellant herein is adopted to the effect that a court must first determine the nature of the cause of action or the nature of the limitation before the application of §11(e) can be determined, then Congress has failed in its purpose to set at rest all previous controversies on this point and to establish a uniform

period of time applicable to all actions brought by the trustee "*upon any claim*" (§11(e)).

The Supreme Court of the United States has rejected the contention of appellant for it has stated that the entire problem created by these previous controversies has been settled by the enactment of §11(e). In *Herget v. Central National Bank & Trust Co.*, 324 U.S. 4, 89 L.ed. 656 the court stated:

"But courts differed as to whether Sec. 11(d) or State statutes of limitation applied to causes of action inherited by the Trustee from the bankrupt or the bankrupt's creditors. (citing cases *which included those involving statutory rights containing limitations.*)

"It was this conflict under section 11(d) of the 1898 Act that was primarily responsible for the framing of the new Sec. 11(e) in 1938. *This latter provision*, which is controlling in this case, *settles the problem* by stating in part that:

" 'A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.' "

If appellant's contention is valid then the Supreme Court is wrong and the problem has not been settled but remains open and the nature of the limitation on the claim asserted by a trustee in bankruptcy must still be examined in every case to determine whether §11(e) is or is not applicable.

***McBride v. Farrington*, 60 F. Supp. 92.**

The significance of *McBride v. Farrington*, 60 F. Supp. 92 lies in part in that it is the most recent in point of time of any of the cases cited herein or to the District Court with respect to §11(e) and Judge Fee there points out that "the Act of 1938 changed the whole situation with regard to limitations under the Bankruptcy Act."

The importance of the opinion of Judge Fee also lies in part in the fact that he has obviously given great study to §11(e) and the history of the cases prior to its enactment and he arrived at the conclusion that the former cases which held that a trustee was bound by the limitations in State statutes were no longer the rule and that the Act of 1938 established a fixed period of two years in all cases. This is clear from the following two quotations from his opinion:

"Before the passage of the Act of 1938 it had been consistently held in the Ninth Circuit that to such an inherited cause of action the general statute of limitations prescribed by the particular state applied. This was the more logical since it is a principle agreed upon with unanimity that where a right of action given by a particular state was conditioned in the same statute by limitation, the expiration of the period thus set would bar the remedy, notwithstanding the language of the old Clause 11, sub. d. Universally the courts maintained that where the general law of the State had provided the right in a creditor, that if the law of the general limitations set up by the State had barred the remedy in the creditors the trustee could not revive it. This was founded upon the proposition that the trustee was enfor-

cing a right based upon rights inherited from the bankrupt, or the creditors, and for which remedies were given by State law. * * * *There were, it is true, cases holding that old Sec. 11, sub. (d) was a true statute of limitations and if the remedy of a creditor were alive on the date of filing the petition, it lingered on available to the trustee until two years after final closing* * * *.

“The Act of 1938 changed the whole situation with regard to limitations under the bankruptcy act. The conflict between the courts regarding the interpretation of old Sec. 11 sub. d, was ‘primarily responsible for the framing of the new Sec. 11, sub. (e) in 1938, (11 U.S.C.A. §29, sub. (e)).’ The new section 11, sub. (e) was obviously a compromise and extended the limitations laid down by the state statutes under the interpretation of *Davis v. Wiley, supra*, to a fixed period of two years beyond the date of adjudication.” (Emphasis supplied)

Sproul v. Gambone, 34 F. Supp. 441.

Sproul v. Gambone, 34 F. Supp. 441 is directly in point herein and completely supports the position of appellee that §11(e) supersedes Rem. Rev. Stat. 5831-5 as applied to this section, if §5835-5 is deemed by the court to be otherwise applicable. In the *Sproul* case the Pennsylvania Bulk Sales Law required that a proceeding be brought against the purchaser to invalidate any sale prohibited by the Bulk Sales law within ninety (90) days from the consummation thereof. The action was not brought by the trustee in bankruptcy until after said ninety day period. The decision thoroughly analyses the holdings of the

courts prior to the enactment of §11 (e) of the Bankruptcy Act, sets forth the legislative history of the section and approaches the whole question in a most fundamental manner including reliance upon the well established principle that state statutes must yield to the requirements of bankruptcy administration. The plaintiff relied upon §11(e) to strike down the ninety day provision of the State statute and the court states:

“In our opinion the plaintiff is right in his contention. The ninety-day limitation of the Pennsylvania Act ceased to apply in this case from the time the petition in bankruptcy was filed; and the trustee’s right of action was from then on limited only by the provisions of Section 11, sub. 3, of the Bankruptcy Act. See *In re Handy-Andy Stores of Louisiana, D.C.*, 51 F.(2d) 98; *Isaccs v. Neece*, 5 Cir., 75 F.(2d) 566.”

“The legislative history of Section 11 clearly indicates Congress was introducing a new provision into the law to cover situations such as exists in the instant case. See original Judiciary Committee Print of the Chandler Act on H.R. 12889, 74th Congress, 2nd Session H.R. 8046, as will be seen by the following foot note to Section 11:

“The principal changes proposed in this Section are:

“An extension of the limitation to receivers.

“A new provision whereupon receivers and trustees may bring action upon claims expiring by state laws between the date of the filing of the petition and the date of adjudication.

“A new provision whereupon the operation of state statutes of limitation is suspended.

"This all leads us to the conclusion that defendant's motion to dismiss must be denied, whether the statute of limitations bars either the right or the remedy, for as we view the law, the state statute as to limitation must yield to the requirements of bankruptcy administration. See *Van Huffel v. Harkelrode*, 284 U.S. 225, 228, 52 S.Ct. 115, 76 L.ed. 256, 78 A.L.R. 453."

***In re Appalachian Publishers, Inc.*, 29 F. Supp. 1021, not persuasive.**

The sole case cited by the appellant in support of his position that §11(e) does not supersede Rem. Rev. Stat. §5831-5 is *In re Appalachian Publishers*, 29 F. Supp. 1021, a case decided by a Tennessee district court in 1939. The case lacks persuasion because of a failure to even refer to §11(e) of the Bankruptcy Act so that we may know conclusively whether or not it was advised of the enactment of §11(e) or whether it was simply considering the former §11(d). Furthermore the case was decided six years prior to the decision in *Herget v. Central National Bank & Trust Co.*, 324 U.S. 4, 89 L.ed. 656, discussed above and the Tennessee court of course did not have the analysis and holding of the Supreme Court in the *Herget* case before it, especially that portion which emphasized the broad sweep of §11(e) and its purpose to set at rest all questions concerning the application of the two year period to all actions. The subsequent case of *Sproul v. Gambone*, 34 F. Supp. 441, discussed above is based on far more study and analysis than *In re Appalachian Publishers* and as a result speaks with far more authority.

In rejecting the case of *In re Appalachian Publishers, Inc.*, Judge Driver in his opinion (Tr. 16-17) stated:

“The case of *In re Appalachian Publishers, Inc.*, 29 F. Supp. 1021, appears to be contrary to my views. There the court held that a special limitation in a Federal Statute (Note: Judge Driver undoubtedly meant “State Statute”) took precedence over the general two-year limitation in the Bankruptcy Act. However, the opinion does not discuss Section 11(e) of the Chandler Act and the case was decided in 1939, before the Supreme Court, in *Herget v. Central Bank Co.* (cited in footnote 6), had expressed its conception of the broad reach of that section. At any rate, I do not accept the theory that when a statute, creating a right of action, imposes a time limit on its exercise, the right does not come into existence at all unless and until an action to enforce it is instituted within the specified time. I prefer the reasoning, implicit in *Sproul v. Gambone*, that such a limitation does not prevent the genesis of the right, but only makes provision for its expiration when the limitation has run.

“In the present case, upon the filing of the petition for appointment of a trustee, within four months after the preference alleged in the complaint, a right of action came into being under the terms of the State statute and the right continued to exist for a period of six months. At the expiration of that time, the right of action ordinarily would have died, but in this case, Section 11(e) of the Bankruptcy Act preserved and extended it for the period of two years subsequent to adjudication.”

***Charlesworth v. Hipsh, Inc.*, 84 F.(2d) 834 distinguished.**

The case of *Charlesworth v. Hipsh, Inc.*, 84 F.(2d) 834 has been effectually distinguished and held to be of no force or effect so far as the interpretation of §11(e) of the Bankruptcy Act is concerned by the court in *Sproul v. Gambone*, 34 F. Supp. 441 at p. 443-444, wherein the court stated:

“A contrary view is expressed in *Charlesworth v. Hipsh, Inc.*, 8 Cir., 84 F.(2d) 834, 835. That case involved an action by a trustee to recover a payment made to creditors of a bankrupt out of the proceeds of a bulk sale, as a preference. The trustee contended that the payment was voidable under the Missouri Bulk Sales Act; but the court held that the Missouri Bulk Sales Act was inapplicable and even if applicable, the ninety-day-limitation period had expired; and this statute of limitations was not tolled by the old Section 11, sub. d of the Bankruptcy Act, 11 U.S.C.A. Sec. 29, sub. d. This ruling was therefore not necessary to a decision of the case, and must be regarded as only dictum. In addition, it appears to us that the authorities cited, *Charlesworth v. Hipsh*, *supra*; *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.ed. 358; *Western Fuel Co. v. Carcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.ed. 210, are not in point, as they are admiralty cases where there was no common law or statutory right to recover for death on the high seas; and the admiralty court applied a state statute allowing recovery in a civil action for wrongful death. The case of *Ford, Bacon & Davis, Inc. v. Volentine*, 5 Cir. 64 S.(2d) 800, cited in support of the decision in the case of *Charlesworth v. Hipsh*, *supra*, was a suit in a Federal court by reason of

diversity of citizenship and the question at issue was whether the statute of limitations of Mississippi or Louisiana should apply. Then, too, in the *Charlesworth* case, the court was considering Section 11, sub. d., of the Bankruptcy Act of 1898."

Doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64, not applicable.

In support of his contention that §11(e) of the Bankruptcy Act was not intended to effect statutory limitations on the commencement of actions as distinguished from pure statutes of limitation, appellant cites *Erie Railroad Co. v. Tompkins*, 304 U.S. 64. Appellant in citing this case misconstrues its reasoning and holding as applied to the present circumstances. The *Erie* case involved a simple personal injury action in which the plaintiff's rights rested solely on "common law" (no Federal powers or statutes were involved). The fundamental point was the extent to which the Federal Judiciary Act of 1789 (28 U.S.C.A. §725) should be extended in the application of general rules of "common law." This statute expressly recognized the paramount authority of the Federal Constitution and statutes wherever applicable because it reads:

"The laws of the several States, *except where the Constitution, treaties or statutes of the United States otherwise require or provide*, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." (Emphasis supplied)

In the *Erie* case (p. 78) the court expressly recog-

nized the supremacy of the Federal Constitution and Acts of Congress over state law:

“Third. *Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state.*” (Emphasis supplied)

In the *Chemurgy* case the statute of the United States (Bankruptcy Act §11(e)), enacted pursuant to constitutional power, requires and provides otherwise than the law of the State (if the state law—Rem. Rev. Stat. §5831-5—is deemed applicable) and therefore the rule of the *Erie* case is obviously not applicable.

By Article I, Sec. 8, Clauses 4 and 18 of the Federal Constitution it is provided that:

“The Congress shall have power, * * *

“To establish an uniform rule on naturalization; and uniform laws on the subject of bankruptcies throughout the United States; * * *

“To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” (Emphasis supplied)

The Federal Congress, acting pursuant to the foregoing constitutional power, enacted §11(e) of the Bankruptcy Act (11 U.S.C.A. §29(e)). *Erie v. Tompkins*, *supra*, is therefore, by the very terms of the statute (28 U.S.C.A. §725) it was interpreting, inapplicable and the provisions of the State statute (if applicable with respect to the assertion of the right given the trustee), must yield to the requirements of bankruptcy administration, As was said in *Sproul v. Gambone*, 34 F. Supp. 441:

“This all leads us to the conclusion that appellant’s motion to dismiss must be denied, whether the statute of limitation bars either the law or the remedy, for as we view the law, the State statute as to limitations must yield to the requirements of bankruptcy administration.”

The Constitutional provision on bankruptcy above referred to emphasizes the element of *uniform laws* on the subject of Bankruptcy. Whenever Congress acts in a field allocated by the Constitution to its exclusive control, Federal action in that field of course takes precedence over and supersedes state action. State action in such a field is controlling only in the absence of Federal action. Sec. 11(e) therefore, is paramount in respect of the subject of limitation of action by trustees insofar as bankruptcy estates are affected.

A proceeding in bankruptcy is a proceeding *in rem* as well as *in personam*. Hence, when the Federal Court takes jurisdiction of the estate of a bankrupt, all the regulatory provisions of the Bankruptcy Act immediately attach. One of these is contained in §11 (e) of the Act. The Act of Congress on this subject of limitations in respect to Bankruptcy estates superseded all others.

As was stated in *Gage v. Du Puy* (Ill.) 19, N.E. 878, with respect to the limitation provision in the Bankruptcy Act prior to the 1938 Act:

“And the Congress of the United States, having plenary power in regard to all matters of bankruptcy, when it chooses to exercise it, had the undoubted power to enact, as was enacted, limiting the time of bringing suits in all courts, state

as well as United States—between assignees in bankruptcy and claimants to adverse interests in property transferred to them.”

Furthermore, Mr. Justice Brandeis who had previously written the opinion in the *Erie* case also wrote the opinion in *Van Huffel v. Harkelrode*, 284 U.S. 225, 76 L.ed. 256, in which the court held that Congress had the power to set aside state laws with respect to the collection of taxes and to provide for their collection in another manner provided by the Bankruptcy Act. The opinion there stated:

“To transfer the lien (of state taxes) from the property to the proceeds of its sale is the exercise of a lesser power; and legislation conferring it is obviously constitutional. Realization upon the lien created by the state law *must yield to the requirements of Bankruptcy administration*. Compare *International Shoe Co. v. Pinkus*, 278 U.S. 261, 73 L.ed. 318, 49 S.Ct. 108; *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 75 L.ed. 645, 51 S.Ct. 270; *Straton v. New*, 283 U.S. 318, 75 L.ed. 1060, 41 S.Ct. 465. In many of the cases in the lower Federal Courts the order of sale entered was broad enough to authorize a sale free from tax liens as well as from others; and in some of them it appears affirmatively that liens for taxes were treated as discharged by the order. No case has been found in which the power to sell free from the lien of State taxes was denied.” (Emphasis supplied)

A practical application of this subrogation of state taxes to costs of administration is found *In re Empire Granite Co.*, 42 F. Supp. 450, in which the court stated at page 458:

“The result is that where unsubordinated liens under Sec. 67 and debts under 64 (1) and (2) exhaust the fund, taxes on personal property, not accompanied by possession, cannot be paid. §67, sub. c.”

Since Congress, under the Constitution, has the power to set aside State laws with respect to the matter most important to the States, that is, the collection of its taxes in the absence of which all functions of the State must terminate, there can be no successful challenge to the Congressional power to fix the time in which rights on behalf of the bankrupt estate may be asserted.

The cases illustrate many instances in which the Bankruptcy Act strikes down various inconsistent state statutes. Language such as the following from *City of New Orleans v. Harrell*, 134 F.(2d) 399@400 can be found in substance in many cases. The state statute there involved was a statute granting a lien in insolvency proceedings to a municipality for taxes on personalty. The court stated:

“If an inchoate lien for taxes be perfected under said Section 67, sub. b, the debt secured by said lien is nevertheless postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of Section 64 of said Act of June 22, 1938. This enactment by Congress suspended the operation of state insolvency laws from the time of such enactment, subject only to such limitations as were or may be prescribed in the Bankruptcy Act; and Section 8435-1 of Dart’s La. Gen. Stats. (La. Act 47 of 1936), has no application to the facts of this case, because it conflicts with the provisions of the Bankruptcy Act above cited.

The Washington preference statute is certainly an "insolvency law" in the sense of a law operative in the event of insolvency, just as much as was the Louisiana statute involved in the foregoing *Harrell* case, which gave cities a first lien on personal property in insolvency proceedings. (Act La. No. 47, of 1936). And in the *Harrell* case it was stated:

"This enactment by Congress suspended the operation of state insolvency laws from the time of such enactment, subject only to such limitations as were or may be prescribed in the Bankruptcy Act; and Section 8435-1 of Dart's La. Gen. Stat. (La. Act 47 of 1936), has no application to the facts of this case, because it conflicts with the provisions of the Bankruptcy Act above cited." Citing many cases including the following:

Tua v. Garriere, et al., 117 U.S. 201, 210, 6 S.Ct. 565, 29 L.ed. 855;

Butler v. Goreley, 146 U.S. 303, 314, 13 S. Ct. 84, 36 L.ed. 981;

International Shoe Co. v. Pinkus, 278 U.S. 261, 49 S.Ct. 108, 73 L.ed. 318;

Carling v. Seymour Lumber Co. (CCA 5) 113 F. 483, 51 C.C.A. 1.

The foregoing cases all demonstrate that Congress has shown no reluctance to supersede State laws when Congress has deemed it advisable to do so in carrying out the mandate of the Constitution to enact "uniform" laws governing bankruptcy. Certainly few matters call for a uniform rule more urgently than the establishment of a fixed period in which trustees may know that they can and must act on behalf of the

estate especially as a trustee simply must have an adequate opportunity to examine into facts and make arrangements for the commencement of actions. The many duties imposed by the Bankruptcy Law and General Orders which fall on a trustee immediately upon his appointment require, for the protection of the estate, that an adequate opportunity be given, to commence actions which may be discovered upon a proper examination with respect to the bankrupt estate. Furthermore, numerous limitations in State statutes such as the ninety-day-limitation in *Sproul v. Gambone*, 34 F. Supp. 441 have frequently practically expired before bankruptcy proceedings, often initiated primarily because of the transactions sought to be avoided, are or can be initiated and without §11(e) such rights might be lost to the creditors of the insolvent estate.

In conjunction with the *Erie Railroad Co.* case discussed above, appellant also quotes from the following cases:

Guaranty Trust Co. v. York, 326 U.S. 99, 101;

Ford, Bacon & Davis, Inc. v. Volentine, 64 F.(2d) 800, 802;

Western Fuel Co. v. Garcia, 257 U.S. 233, 243;

Vaughn v. U. S., 43 F. Supp. 306, 308;

Wilson v. Railway Co., 58 F. Supp. 844, 847;

Garrett v. Moore-McCormack Co., 317 U.S. 239, 245.

Appellant at page 19 of his brief admits that the

Erie Rd. Co and *York* cases are not in point here. The balance of said quotations are likewise not in point because they either simply discuss the difference between a procedural statute of limitations and the limitation contained in a statute granting a right or they discuss the deference which the federal courts will give to state statutes in fields where Congress has not acted. None of these cases of course involve in the slightest degree the Bankruptcy Act in general or §11(e) thereof in particular. None of these cases involve an instance where Congress has acted to supersede or suspend state law. Therefore, none of these cases can have any persuasive or other effect herein.

Summarizing, we submit that §11(e) of the Bankruptcy Act (11 U.S.C.A. 29 (e)) rather than Rem. Rev. Stat. §5831-5 is the controlling statute in this case with respect to the period in which this action could be commenced. §11(e) is broad and all inclusive in its language, admits of no exception and is clearly illustrative of an instance where Congress, acting pursuant to its constitutional power, has superseded state laws in conflict therewith. Section 11(e) preserved and extended the right granted by Rem. Rev. Stat. §§5831-4 and 5831-6 for the period of two years subsequent to the adjudication of *Chemurgy's* bankruptcy.

CONCLUSION

Each of the contentions of appellant should be overruled for the following reasons:

1. The filing of a petition by Chemurgy on May 29, 1947 under Chapter XI of the Bankruptcy Act was an application for a receiver (defined by Rem. Rev. Stat. §5831-4 to include a trustee) within the meaning of Rem. Rev. Stat. §§5831-4 and 5831-6.

2. Appellee was appointed pursuant to said application within the meaning of Rem. Rev. Stat. §5831-4.

3. Rem. Rev. Stat. 5831-5 upon which appellant relies is not applicable to this action for the following reasons:

(a) By reason of the clause therein—"If not otherwise limited by law",

(b) By reason of the clause therein—"actions in the courts of this state",

(c) By reason of §11(e) of the Bankruptcy Act (11 U.S.C.A. §29 e) which in any event supersedes Rem. Rev. Stat. §5831-5 so far as this action is concerned.

We respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

EGGERMAN, ROSLING & WILLIAMS,
DEWITT WILLIAMS,

Attorneys for Appellee.



APPENDIX

Rem. Rev. Stat. §5831-4 and §5831-6:

SECTION 5831-4. — Preferences by insolvent corporations. — Definitions. Words and terms used in this act shall be defined as follows: (a) "Receiver" means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation. (b) "Date of application" means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is made; or in case the appointment of a receiver is lawfully made without court proceedings, then it means the date on which the receiver is designated, elected or otherwise authorized to act as such. (c) "Preference" means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class (L. '41, ch. 103, §1).

SECTION 5831-6—Preference voidable when—Trust fund doctrine superseded. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded (L. '41, ch. 103, §3).

Rem. Rev. Stat. §5831-5:

SECTION 5831-5.—Action to recover—Limitation. If not otherwise limited by law, actions in the courts of this state by a receiver to recover preferences may be commenced at any time within but not after six (6) months, from the date of application for the appointment of such receiver (L. '41, ch. 103, §2).

Washington Preference Statute prior to Rem. Rev. Stat. §§5831-4-6 (Laws of 1931, ch. 47, §§1 and 2a and b). Repealed by Laws of 1941, ch. 103, §8:

SECTION 1. Actions in the courts of this state by a trustee, receiver or other liquidating officer of an insolvent corporation, to recover a preference as herein defined may be commenced at any time within six months from the time of the filing of the application for the appointment of such trustee, receiver or other liquidating officer.

SECTION 2. a. A corporation shall be deemed to have given a preference if, being insolvent, it has, within four months before the filing of an application for the appointment of a trustee, receiver, or other liquidating officer of such corporation, procured or suffered a judgment to be entered against itself in favor of any person, or made a transfer of any of its property, and the effect of the enforcement of such judgment or transfer will be to enable any one of the creditors of said insolvent corporation to obtain a greater percentage of his debt than any other of such creditors of the same class.

b. If a corporation shall have procured or suffered a judgment to be entered against it in favor of any person or has made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, the corporation be insolvent and the judgment and transfer then operate as a preference,

and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment of transfer would effect a preference, it shall be voidable by the trustee, receiver, or other liquidating officer of said insolvent corporation, and he may recover the property or its value from such person.

Section 11(d) of the Bankruptcy Act of July 1, 1898, 30 Stat. 549, 11 U.S.C.G. §29(d). Superseded by §11e of the Bankruptcy Act quoted on page 41 of this brief):

“d. Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.”

United States
Court of Appeals
For the Ninth Circuit

ELMER SCHNEIDMILLER,

Appellant,

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a Corpora-
tion, Bankrupt,

Appellee.

REPLY BRIEF OF APPELLANT

JOSEPH L. HUGHES,
BENJAMIN H. KIZER,
Old National Bank Building,
Spokane, Washington.

GRAVES, KIZER & GRAVES
Of Counsel

*Appeal from the United States District Court
for the Eastern District of Washington,
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FILED

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PREFACE

Our high regard for the skill and ability of counsel for appellee increases our great surprise at the conduct of counsel in his answering brief in so repeatedly going outside of the record of this case to recite facts that are known to him alone.

(a) On page 3, again on page 5, again on page 40, and yet again on pages 41-2, counsel is at pains to give his own unverified account of other cases parallel to the case at bar pending before two other federal judges, where, as he avers, like decisions to that of Judge Driver's, were rendered orally by Judges Black and Fee.

Neither this court nor ourselves are advised as to whether all or any of the questions here raised or all or any of the authorities here cited were presented to either of these judges. Neither this court nor ourselves can know how much was involved or how seriously counsel for creditors took their burden of defense. The fact that neither trial judge wrote an opinion and that the defendants did not see fit to appeal may be some evidence that the decisions were not intended as precedents even with the trial judges themselves.

In our many years of active practice this is the first time that we have encountered counsel who recited his version of the offhand oral opinion of trial judges on a point of substantive law, with a view of influencing the decision of an appellate court.

(b) Again, on pages 13 and 28, counsel has seen fit to quote from the debtor's petition for an arrangement in the bankruptcy proceedings in support of his position, although there is nothing in this record pertaining to that petition.

In the limited time allotted us for reply brief, we have no opportunity to verify the accuracy of the quotations, or to inquire, as seems likely, whether other allegations in the petition was called to this court's attention might be more favorable to us than the quotation cited by counsel. Furthermore, if we had the time, our standards of propriety in these matters would foreclose us from quoting such paragraphs.

(c) Somewhat less serious, because we, too, know the facts but still constituting an unwarranted excursion outside the record, is the statement of appellee on page 10 of his brief that only one of the three counsel who argued the case below stressed the point that a petition for an arrangement is not an application for a receiver. Having so recited, appellee then declares that it seems obvious that this point "has been included as a point of objection only out of deference to one of counsel whose case is controlled by this appeal." This court is familiar with the practice of associate counsel in dividing up points for argument. The fact that one of counsel argues exclusively one point and other counsel argue other points cannot be taken to impeach the sincerity of all counsel, respecting each of the points urged individually by them.

It is our view that appellee owes to this court and to appellant an apology for thus flagrantly and repeatedly travelling outside the record.

ARGUMENT

I.

Was Chemurgy's Petition for an Arrangement an Application for Appointment of a Receiver?

(a) *Significance of "the Filing of the Application."*

On this point, at page 10 of his trial brief, appellee places in the foreground that part of the trial court's opinion in which the learned trial judge has argued that it is necessary to go back to the petition for an arrangement in order to comply with Rem. Rev. Stat. of Wash., §§ 5831-4-6. By brief excerpt from that opinion of the trial judge (Op. 10) it will be seen that the court felt it necessary to search for a date of filing an application. Thus, the court says:

"The crucial event on which the reckoning of time is based as to both limitations is the *filing* of the application for the appointment of the trustee. * * * The petition for arrangement is the only petition, or application, *ever filed* pursuant to which the appointment of the trustee is made." (Emphasis ours.)

In thus emphasizing the date of filing it is obvious that the trial judge has overlooked the decision of the Supreme Court of Washington in *Seattle Ass'n, etc. v. GMAC*, 188 Wash. 635, 639; 63 P. (2d) 359.

In that case the debtor made a common law assignment for the benefit of creditors and GMAC was sued by the assignee to recover a preference received within four months prior to the assignment. GMAC raised the point that the assignee was not appointed upon "the *filing* of * * * application."

Although presumably the common law assignment had not been filed, and an assignment for the benefit of creditors is an "application" in only the most liberal sense of the word, the Supreme Court of Washington nevertheless held that it would not regard the words in the statute "the filing of an application" as limiting the right of the assignee for the benefit of creditors to sue under this statute. From this decision it is clear that there is no occasion to place the excessive emphasis the trial judge placed upon the "crucial" need to find a date of *filing*. The real test is when the "application" went into effect.

If the able trial judge had not thus stuck in the bark over his assumed necessity of finding that an application for appointment of trustee had been "filed," he would not have felt obliged to go back to the date of filing the petition for an arrangement as the only application "ever filed." As we pointed out in our opening brief (p. 10), he would then have perceived that when Chemurgy found itself unable to consummate its proposed plan of arrangement, and so advised the court "upon a hearing duly noticed and held" (See Comp. par. 4, Tr. 2-3), this

notice and hearing of themselves constituted an application for adjudication of bankruptcy and therefore for the appointment of a trustee.

It is clear that since an unfiled assignment for the benefit of creditors constitutes an application and its date sets in motion the effect of the statute, as was held in the GMAC case, *supra*, then such a notice and hearing (Complaint, par. 4, Tr. 3) that Chemurgy had been compelled to abandon its proposed plan for an arrangement was likewise an application for the appointment of the trustee in bankruptcy, in this statutory sense. It is equally clear that this notice and hearing constituted the originating fact that authorized the bankruptcy court so to proceed.

(b) *Arrangement Provisions in Chapter XI.*

It would be fruitless to follow appellee in his prolonged recital of the various sections of Chapter XI (U.S.C.A., Title XI, §§ 701-799) pertaining to *arrangements*, whereby an embarrassed creditor may obtain relief. Since these sections provide for relief for bankrupts (§ 721), as well as for debtors (§ 722) who are merely temporarily embarrassed, certain of these provisions can, of course, be assimilated to like provisions where a bankrupt files a petition in bankruptcy.

But these similarities prove nothing. Our legal inquiry is a simple one. Under Rem. Rev. Stat. § 5831-4, what is the date when this debtor applied for the appointment of a "receiver"? It is manifest that it

did not intend to apply for the appointment of a receiver or trustee at that time. It was not confessing bankruptcy. It was rather seeking an arrangement to escape the necessity of bankruptcy with the consequent appointment of a trustee.

Appellee's own allegation in this complaint (Tr. 3) shows conclusively that what operated to set the bankruptcy machinery in motion was the notice and hearing in November when the debtor announced that it had failed in its plan for an arrangement. This announcement, this notice and hearing terminated the plan for an arrangement and set the wheels in motion that resulted in adjudication of bankruptcy and the appointment of appellee as trustee.

Why, then, does appellee disregard the reality, the actual transaction that operated as an application for the adjudication of and appointment of a trustee? Simply because thus to accept the actual facts would deny to appellee any shadow of right to recover.

So, there is built up by appellee this artifice, this pretense, this fiction that there lurked in the petition for an arrangement an abandonment of that petition, a petition for an adjudication of bankruptcy and for the appointment of a trustee.

Ever since the opinion of Mr. Justice Storey in *U. S. v. 1960 Bags of Coffee*, 8 Cranch 398, 415 (See, also, a collection of modern cases to same effect in *Union Oil Co. v. Johnson*, 137 P. (2d) 706, 708), the rule has been uniformly recognized "that legal fictions

will not be adopted unless they are consistent with all relevant facts and circumstances and do equity.”

(c) *Hardship Plea.*

On pages 20-25 of appellee’s brief, appellee makes an elaborate plea of hardship, if the court does not adopt its forced construction of a petition for an arrangement as, in effect, an application for the appointment of a trustee.

Appellee says that if debtors

“* * * can thus initiate proceedings under Chapter XI and hold such proceedings before a district court for a period of four months they can, under appellant’s contention, free themselves from the necessity of returning payments which they should have returned if ordinary bankruptcy proceedings had been initiated at the time Chapter XI proceedings were begun.”

Nonsense!

Section 732 of Chapter XI (U.S.C.A.) specifically provides that

“* * * the court may, upon the application of any party in interest, appoint, if necessary, a receiver of the property of the debtor.”

Thus, if any creditor of the debtor who files such a petition for an arrangement believes that it will result in the failure to recover preferential payments he has only to make such a showing to the court, have a receiver appointed and that receiver can at once bring suit to recover these preferences.

Precisely the same plea of hardship under such circumstances was offered to the Supreme Court of Washington in *Peeples v. Hayes*, 4 Wash. (2d) 253; 104 P. (2d) 305, and was there decisively rejected by that court which was at pains to point out similar remedies for the creditors, and thereupon strictly applied the statute as we have contended.

In view of the plain remedy in the hands of any creditor we must admire the courage with which counsel asserts a hardship, whose non-existence is so manifest.

This court is doubtless well aware of the course of events that so often occur when a debtor that is not bankrupt in the federal sense, but is temporarily embarrassed for want of ready cash to meet current bills, is struggling to keep going. His principal creditors may share his hope that the debtor can work his way out of his difficulties. So, they stand by, refraining from moving in on the debtor, for month after month. Each month that the creditors wait cuts off from their recovery an earlier month of payments made in due course to various of the creditors of the debtor.

Whether a petition for an arrangement is filed or not, this period of grace to enable a debtor to work his way out of his difficulties always results in failure to recover certain payments made at an earlier date.

How long this period of grace shall run depends on the creditors. That state statute we are here con-

sidering puts the creditors strictly on notice. They cannot let time run out without taking action, and then, six months later when the gamble of survival has run against the debtor, go back to a period of twelve months or more and make recovery of payments as preferential when the statute says they must act within six months.

The whole endeavor of appellee in the case is just to have it both ways. The creditors whom he represents stood by for six months without taking action, doubtless because they, like the debtor, hoped for an arrangement that would enable it to work its way out. And having thus stood by, they have lost their right to go back to that earlier period.

II.

Was the Petition for an Arrangement an Application for Appointment of Appellee, and Pursuant to which he was Appointed Within the Meaning of Rem.

Rev. Stat. § 5831-4-6?

(a) *Meaning of Limiting Phrases.*

The admiration which appellee expresses on page 3 of his brief for Judge Driver's sure experience in bankruptcy matters, so long as that jurist holds with him, quickly dissolved in criticism on two other contentions of appellee, which Judge Driver found to be without merit. On pages 32 to 40 of appellee's brief he argues that Judge Driver is mistaken in

his interpretation of the two underscored phrases in the language of Rem. Rev. Stat., § 5831-5 which follows: "*If not otherwise limited by law, actions in the court of this state* by a receiver to recover preferences may be commenced at any time within but not after six months from the date of the application for the appointment of such receiver."

So that this court may have conveniently before it Judge Driver's decisions on these two points so criticised by appellee we quote from his opinion (Tr. 10) the following:

"The plaintiff earnestly urges that the State statute is not applicable because of the following language (italicised for emphasis) of Section 3, namely: '*If not otherwise limited by law,*' an action may be brought by a trustee '*in the courts of this state*' to recover a preference within but not after six months from the filing of the petition for the appointment of the trustee. The argument is that the action is 'otherwise limited' by the general two-year limitation in Section 11e of the Bankruptcy Act (11 U.S.C.A., 1947 pocket part, Sec. 29e) and, furthermore, that the six months' limitation in the State Act, by its terms, is restricted to State court actions and is wholly inoperative in actions prosecuted in the Federal Courts. I do not so construe the State Act. I think that the words, 'unless otherwise limited by law,' apply only to the affirmative grant of the right to bring the action within the specified time and should not be considered, as plaintiff's argument implies, to mean 'unless otherwise *extended* by law.' The statute says that an action to recover a preference *may* be brought in six months, but the phrase under consideration makes

it clear that the grant is not an absolute one and will not sustain an action barred by some other applicable law. It may have been included in Section 2 in order to avoid all possibility of conflict with the provision of Section 3 (Rem. Rev. Stat. 5831-6) limiting recovery of preferences to transactions which occurred within four months prior to the application for appointment of the receiver or trustee. The language of Section 2 makes it clear that if the action is barred by Section 3, the affirmative grant in Section 2 will not revive it.

“Moreover, I think the language in Section 2 ‘in the courts of this State,’ should not be construed as a legislative declaration that if the action to set aside a preference is brought in a Federal Court, or in a court of a foreign state, the six months’ limitation does not apply. The statute is a further modification of the trust fund doctrine, a long-standing Washington rule that the assets of an insolvent corporation constitute a trust fund for the benefit of its creditors and that transaction, which prefer one creditor over another, are voidable. The Washington Supreme Court had described the doctrine as ‘our court made rule.’ It was a natural thing for the Legislature, in restricting it, to use the expression, ‘in the courts of this State.’ The six months’ limitation in Section 2, since it is an integral part of the statute granting the right of action, by a generally accepted rule, is not an ordinary limitation of the remedy, but a limitation of the right, which must be accepted and applied by the courts of any other state where an action to enforce the right may be brought. (See Restatement, Conflict of Laws, Sec. 605; 15 C.J.S., Conflict of Laws, Sec. 22e.) It would, indeed, be a violent assumption that the Legislature, by the mere use of the phrase, ‘in the courts of this State,’ intended to set aside the well known rule

and make its express, special limitation of the right of action, which it had created, operative only in the courts of Washington and not in any other courts."

With considerable unction, appellee quotes the well-established rule that in making material changes in the language of a statute, the legislature cannot be assumed to have regarded such changes as without significance.

Granted at once, without question.

But it is appellee himself, not appellant, who distorts the phrase "if not otherwise limited by law," to fit his personal need in this case. The court will note that this section of the quoted statute is expressed in terms of grant of power to sue, "if not otherwise limited by law." To say, as appellee does, that this *limitation* on the right to sue is, as to him, a grant of *extra time* to sue, simply doesn't make sense. The word "limitation" as here used is manifestly not confined to limitations of time. Since the opening phrase of the statute is so unequivocally a limitation, it is inconceivable that any court would distort these words to mean "unless the time in which to sue is *extended* by a federal statute," which is just what appellee, in fact, contends.

Most unplausibly appellee also contends that the underscored phrase in the statute quoted above, "the courts of this State" were meant to open the door for the federal courts of this state to disregard this

limitation of time in which to sue. But remembering that the legislature was dealing with the trust fund doctrine, especially developed by the "courts of this State," it was but natural that the legislature, in altering this State doctrine, should point its remedy to the "courts of this State." Since § 5831-5 of Rem. Rev. Stat. is phrased in terms of a grant of power to sue, it could more plausibly be argued that the legislature intended all suits under this statute to be prosecuted only "in the courts of this state."

Be that as it may, it is simply absurd to read into this innocent phrase a deliberate grant of power by the legislature of this state to other state courts and the federal courts to do what the Washington state courts are prevented from doing. The jealousy of all state legislatures of federal power makes it plain that this was farthest from the mind of the draftsmen of this state or of the legislature that adopted it.

The argument of appellee on these two points, though much elaborated, calls for no further analysis.

(b) *Was Appointment of Appellee Made "Pursuant to" Petition for Arrangement?*

On page 4 of appellant's opening brief, for purposes of clarity appellant divided his argument on his objection number one (Tr. 26) into two parts. Both parts arise out of the phrase in that objection "the appointment of a receiver within the meaning of Remington's Revised Statutes § 5831-4." That section of Remington's Revised Statutes prescribed, as

we there pointed out, that the date of application refers to (a) "the application for the appointment of a receiver, (b) pursuant to which application such appointment is made." In cutting that phrase in two and considering, (a) the application for the appointment of the receiver and, (b), the phrase "pursuant to which application such appointment is made" we have presented the matter precisely and exactly within the limits of the objection.

As to this second half of our objection, appellee contends himself with declaring dogmatically (Br. 28) that

"* * * the point is made without merit and was not even made a basis of objection at the time the District Court entered his findings and conclusions as required by Rule of Civil Procedure 46." (See Tr. 26.)

The main strength of the point (b) lies in the fact that it once more discloses the complete artificiality of the court's conclusion that he must go back to a petition for arrangement to find the date of filing of an application for the appointment of the trustee. Assuredly no one can assert that the debtor intended to apply for a receiver and the words "pursuant to" in the statute makes it clear that intent is of the essence of the statutory requirement.

III.

Does 11 U.S.C.A. § 29 (e) Destroy the Effect
of Rem. Rev. Stat. § 5831-5?

(a) *Effect of 11 U.S.C.A. § 791.*

On page 31 of appellee's brief, appellee quotes in full § 791 (11 U.S.C.A.) which suspends certain statutes of limitation "while a proceeding under this chapter [XI] is pending and until it is finally dismissed." From this section counsel draws the inference that to urge, "as appellant in support of this point must urge" that an action should have been brought during the pendency of the arrangement proceedings to recover this preference is unreasonable.

In his eagerness to make this point appellee seems to overlook the fact that the only statutes of limitation so suspended by this bankruptcy statute are those affecting claims provable *under this chapter* and the running of all periods of time prescribed *by this act*. In other words, Congress was scrupulous to see that only federal statutes were so suspended.

This limitation of the suspension at once gives rise to the questions: Why did Congress only suspend federal statutes? Why did it not omit the words "under this chapter" and "prescribed by this act" so that the suspension would apply generally? This strict limitation of the suspension to federal statutes is significant of an intent *not* to use the "arrangement" Chapter (XI) to suspend the running of time pre-

scribed by any state statute. In other words, the exact opposite of what counsel contends is reasonable. The statute manifestly contemplates that if recoveries of this character are to be sought, action should be brought during the pendency of the petition for an arrangement.

(b) *Analysis of Appellee's Authorities.*

On this point appellee's main reliance is *Herget v. Central National Bank & Trust Company*, 324 U. S. 4, which pleases appellee so much that he cites it six times under this heading and prints his favorite quotation from it twice, once on page 44 and again on page 45. Such a paragraph wrenched out of its context may seem to have a surface pertinence. But in fact the *Herget* case does not touch the case at bar at any point. In the *Herget* case the court affirmed only that U.S.C.A. § 29 (e)

"* * * bars after two years from the date of adjudication in bankruptcy an action brought by the trustee in bankruptcy to set aside and recover a preferential transfer; and a state statute of limitations cannot operate to extend the period." (Syllabus)

This is the negative side of 29 (e). Obviously Congress intended the bankruptcy trustee to act promptly and it thus limited his power to sue.

But to point out when a trustee cannot sue throws no light on the times when or the circumstances under which he can sue. Granting, for the sake of this argument, that 29 (e) so suspends the ordinary state

statutes of limitation, the question still remains: Does 29 (e) strike out of state statutes such as Rem. Rev. Stat. § 5831-5 a provision which is made a condition of the right to sue and which is not normally regarded as a statute of limitations at all? There is nothing in the language of 29 (e) that in any way indicates an intent to go beyond the ordinary statute.

Equally, there is nothing in the Herget decision, or in the reasoning of the court in that decision, to indicate that this problem was before the court, or that it intended its generalization to apply to such a case as we have here. To lay such extraordinary emphasis on the Herget case is simply to expose appellee's unhappy consciousness of his want of authority for his position.

It is appropriate here to emphasize again the wide difference between ordinary statutes of limitation, dealt with by 29 (e), and the Washington statute, Rem. Rev. Stat. § 5831-5-6. In *Peeples v. Hayes*, 4 Wash. (2d) 253, 257, 104 P. (2d) 305, the Washington Supreme Court, following and re-affirming its earlier decision in *Morris v. Orcas Lime Company*, 185 Wash. 126; 53 P. (2d) 605, defines the basic difference between these ordinary statutes and the statute here under consideration in these words:

“The fact that statutes of limitation, properly so-called, are statutes of repose * * * at once suggests that 5831-1 was not intended to operate as a statute of limitation in the sense that the word ‘limitation’ is used in Chapter III, Title 2

Rem. Rev. Stat.” (The chapter in which all the various Washington limitations of action are collected.)

The Washington Supreme Court following the *Orcas Lime and Peeples* cases in *Eagles v. General Electric Company*, 5 Wash. (2d) 20, 23, 104 P. (2d) 912, puts the distinction concisely in saying that § 5831-1 “is not in a true sense a statute of limitations at all.” This court repeated this characterization in *Lane v. Dept.*, 21 Wash. (2d) 420, 425; 151 P. (2d) 440 (1944). See, also, to the same effect, *Earle v. Froedtert*, 197 Wash. 341; 85 P. (2d) 264.

Appellee then proceeds to quote elaborately from *In re Handy-Andy Stores*, 51 F. (2d) 98, and to cite also in support of it *Isaacs v. Neece*, 75 F. (2d) 566. These two cases are simply one side of an old controversy between the Fifth Circuit and the Ninth Circuit in which the Fifth Circuit criticised the Ninth Circuit’s holding in *Davis v. Willey*, 273 F. 397, and *Meikle v. Drain*, 69 F. (2d) 290, declaring in *Isaacs v. Neece*, *supra*, that the view of the Fifth Circuit “furnishes a more reasonable, and more workable theory of limitation than the one advanced in the *Davis* and *Drain* cases, *supra*.”

That controversy antedating the enactment of § 29 (e) does not aid in the solution of our problem.

Yet the skeleton of this earlier difference between the two Circuits came to the fore in *Sproul v. Gambone*, 34 F. Supp. 441, on which Judge Driver places

his sole reliance—and justly so, for there is no other case that touches the problem in favor of appellee.

Sproul v. Gambone cites the Handy-Andy and Isaacs v. Neece cases, and no others, as the warrant for its decision. Furthermore, in so doing, it treats the Pennsylvania bulk sales statute's provisions as an ordinary statute of limitation and quite ignores the distinction between the ordinary statute of limitations, which goes to the remedy, and a statute that conditions and limits the right, itself, which is so carefully recognized and applies in *In re Appalachian Publishers*, 29 F. Supp. 1021.

In *McBride v. Farrington*, 60 F. Supp. 92, there is also nothing that throws any light on our specific problem, although there are general remarks that would be interesting as dicta if we were concerned with the ordinary statute of limitation. However, one remark of Judge Fee, dealing with the history of the Act, is of interest when he declares that 29 (e) "was obviously a compromise."

A part of that compromise is expressed in the last half of § 29 (e), which we quote, omitting inapplicable words:

"* * * where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable State law, for taking any action, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the

bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication."

This part of § 29 (e) shows a manifest inclination to have scrupulous regard to state law that is quite inconsistent with the ruthless sweep claimed by appellee for 29 (e).

Under this section, read as a whole, the most that could be urged by appellee, it seems to us, is that where, as a condition to his right to bring suit he was obliged to take action within six months, he might claim that he had sixty days after the adjudication within which to take the action of bringing the suit required by such state statute.

But even this safeguard in the Act does not protect him; for the adjudication took place on December 13, 1947, he was appointed trustee on January 6, 1948, and he did not bring this suit until May 28, 1948.

CONCLUSION

IV.

In closing this reply brief we cannot refrain from again commenting on the outrageous perversion of the meaning and purpose of Rem. Rev. Stat., § 5831-4-6 if appellee's position were to be sustained by this court.

The Bankruptcy Act itself in 11 U.S.C.A. § 96, elaborately defines preferences in bankruptcy. All the remedies of this section were open to appellee. If any of these alleged preferences come within the bankruptcy definition of preferences, appellee had and still has the right under this federal statute to sue for and recover them.

But, believing that this state statute is more advantageous, he prefers to shelter under that Act and to sue for recovery of alleged preferences by means of its terms. Yet he repudiates a part of the statute that the legislature has woven into the very warp and woof of the statute, and thus gives it an effect never intended by the legislature.

No language in 29 (e) authorizes such a suit; for, at the most, that section deals only with ordinary statutes of limitation.

But appellee goes farther than this. He insists also that he may go back six months to the filing of a petition for an arrangement and arbitrarily give to it the effect of an application for appointment of the trustee, when manifestly that must have been the farthest from the intent or the purpose of the debtor.

It will indicate an appropriate respect for state

statutes, it will be just, it will deal in the realities of intent and purpose to reverse the decision of the trial court.

Respectfully submitted,

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POSTSCRIPT

We have stopped the binding of these briefs after they were fully printed in order to attach this postscript calling to the attention of the court an important case extending the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, and *Guaranty Trust Co. v. York*, 326 U. S. 99, to a degree that makes it directly applicable to the case at bar. This late decision of the Supreme Court of the United States, *Ragan v. Merchants Transfer & Warehouse Co.*, found in L. Ed. Advance Opinions, U. S. Supreme Court, Volume 93, No. 17, at page 1248, decided on June 20, 1949, reached the desk of the writer of this opinion only on this 10th day of August, 1949.

While this was a case founded on diversity of citizenship, the issue arose, as it does in the case at bar, as to what extent the limitations contained in a state statute will be applied when a federal court is called on to enforce a right found only in local law. Speaking to this point the court says (p. 1250):

“* * * Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. See *Cities Serv. Oil Co. v. Dunlap*, 308 US 208, 84 L. ed. 196, 60 S. Ct. 201; *Palmer v. Hoffman*, 318 US 109, 117, 87 L. ed. 645, 651, 63 S. Ct. 477, 144 ALR 719. It accrues and comes to an end when local law so declares. *West v. American Teleph. & Teleg. Co.*, 311 US 223, 85 L. ed. 139, 61 S. Ct. 179, 132 ALR 956; *Guaranty Trust Co. v. York*, 326 US 99, 89 L. ed. 2079, 65 S. Ct. 1464, 160 ALR 1231, *supra*. Where local

law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins* is transgressed.

“We draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with *Erie R. Co. v. Tompkins*.”

This case strikes a heavy and telling blow against the effort of the appellee to distort a local statute under which he has brought suit in order to give it a significance never intended by the lawmakers who enacted it.

United States
Court of Appeals
For the Ninth Circuit

ELMER SCHNEIDMILLER,

Appellant,

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy
for Northwest Chemurgy Cooperative, a Corpora-
tion, Bankrupt,

Appellee.

SUPPLEMENT TO REPLY BRIEF OF APPELLANT

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*Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division*

AUG 30 1948

PAUL P. O'BRIEN, -

CLERK

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SUPPLEMENT TO REPLY BRIEF OF APPELLANT

We must confess that in the brief time (10) days) allotted for preparing, printing and serving our reply brief we failed to discover that § 712 of the chapter on Arrangements (11 USCA), of critical importance, has a most instructive history in a previous enactment. This earlier enactment furnishes a complete and conclusive answer to the trial court's legal position in respect of our Objection No. 1 (R. 26).

Because of the importance of this point and the clear light this earlier statute throws upon the construction of § 712, we ask the indulgence of the court in troubling it with this supplement to our reply brief.

In arguing that a petition for an arrangement of a debtor is an application for the appointment of a receiver within the meaning of Remington's Revised Statutes, § 5831-4-6, the learned trial judge, in his opinion, declared (R. 10):

“The petition for arrangement, from its inception, serves the purpose of an alternative petition for adjudication. * * * In legal effect, it (the petition for arrangement) is the same thing as the application for the appointment of the trustee.”

It will be observed that this is sweeping language. It treats the petition for an arrangement as the equivalent of “an alternative petition for adjudication” for all purposes.

In seeking to sustain this position of the court, appellee at page 14 of his brief placed emphasis on 11 USCA, § 712, from the chapter on arrangements, which is there quoted to the following effect:

“Where not inconsistent with the provisions of this chapter, the *jurisdiction, powers, and duties of the court* shall be the same— * * *

- (2) “Where a petition is filed under Section 322 of this act as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered at the time the petition under this chapter was filed.” (11 USCA, § 712)

On scrutinizing closely the terms of § 712, however, it is seen that Congress has carefully limited the application of a petition for an arrangement in this respect to “the *jurisdiction, powers and duties of the court,*” and grants no such effect to the powers of its officers, or of a trustee, or to the rights of creditors. Following up the earlier history of this section, we now find that this § 712 has been taken, with significant omissions, from 11 USCA, § 202(m). This history of the earlier form of § 712 is disclosed by reference to the volume 11 USCA, Bankruptcy, §§ 201-500 at page 4 where we find it recited that:

“Section 201, subd.(m): Similar provisions are now contained in sections 711 and 712 * * * of this title.”

This original § 202(m), which is § 74(m) of the Bankruptcy Act provided as follows:

“In proceedings under this section, except as otherwise provided therein, the jurisdiction and powers of the court, the title, *powers*, and duties of its officers and, subject to the approval of the court, their fees, *the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the property of the debtor* and the jurisdiction of appellate courts shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor’s petition or answer was filed and any decree of adjudication thereafter entered shall have the same effect as if it had been entered on that day.”

Turning back to § 712 we now see that it is *only* the “jurisdiction, powers and duties of the court” that may be treated as relating back to the date of filing the petition for an arrangement. On the other hand, by this deliberate omission of the clauses “the titles, powers and duties of its officers and * * * the duties of the debtor and the rights and liabilities of creditors and of all persons with respect to the property of the debtor,” Congress has made it sun-clear that it does not intend to relate these powers and rights of creditors or of their trustee, arising out of the adjudication and appointment, back to the date of filing a petition for an arrangement. Yet, this is exactly what the trial court has undertaken to do.

This is the place to apply the familiar rule called to our attention by appellee on page 34 of his brief in a quotation from *Graffell v. Honeysuckle*, 30 W. 2d 390, 191 P. 2d 858:

“where a material change is made in the wording of a statute, a change in legislative purpose must be presumed.”

Such an application of the rule inevitably results in the following conclusion. Where, as here, the powers of the trustee as an officer of the Bankruptcy Court and the rights of the creditors represented by him are involved, the deliberate exclusion from § 712 of the powers earlier granted to the trustee and to the creditors under § 202(m) amounts to a prohibition of the right of the trustee to treat the date of the filing of the petition for an arrangement as if it were the date of an application for the appointment of the trustee.

Again craving the indulgence of the Court in submitting to it this Supplement to our Reply Brief, we again respectfully submit that the judgment of the trial court should be reversed.

Respectfully submitted,

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No. 12236

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

CHRYSLER CORPORATION PARTS WHOLE-
SALEERS, et al.,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

AUG 25 1949

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, Western District of Washington, Northern Division

Criminal Action No. 47762

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHRYSLER CORPORATION PARTS WHOLESALE-
SALERS, NORTHWEST REGION; MoPAR
CLUB; S. L. SAVIDGE, INC.; AMERICAN
AUTOMOBILE COMPANY; COMMERCIAL
AUTOMOTIVE SERVICE, INC.; WIN-
THROP MOTOR COMPANY; RIEGEL
BROTHERS, INC.; W. G. POWELL; JOHN
MUNSTER; STANLEY SAYRES; RALPH
W. HANSON; FRANK L. HAWKINS;
CARL J. BRUSH; GEORGE W. MILLER;
STANLEY PETERSON; DEE R. RIEGEL;
T. H. NAISMITH,

Defendants.

INDICTMENT

The Grand Jury charges:

I.

The Defendants

1. The Chrysler Corporation Parts Wholesalers, Northwest Region, is hereby indicted and made a defendant herein. Said defendant is an unincorporated association of persons and concerns doing business in the states of Washington, Oregon or

Montana, who are authorized by the Chrysler Corporation to sell Chrysler replacement parts and engines both at wholesale and retail. Said association transacts business in the city of Seattle, Washington. Said association is sometimes hereinafter referred to as the "Wholesalers Association."

2. The MoPar Club is hereby indicted and made a defendant herein. Said defendant is an unincorporated association of persons and concerns doing business in the Puget Sound area of the state of Washington (including the cities of Everett, Seattle, Kirkland, Redmond, Bellevue, Renton, Kent, Auburn, Puyallup, Tacoma, and Bremerton, all in the state of Washington), who are authorized by the Chrysler Corporation to sell Chrysler replacement parts and engines at retail. Said association transacts business and keeps its records in the city of Seattle, Washington.

3. The corporations listed below are hereby indicted and made defendants herein. Each of said corporations is incorporated under the laws of the state of Washington and has its principal place of business in the city indicated below. Each will sometimes hereinafter be referred to by the abbreviated name indicated below:

<u>Name of Corporation</u>	<u>Principal Place of Business</u>	<u>Abbreviated Name</u>
S. L. Savidge, Inc.....	Seattle, Washington	Savidge
American Automotive Company....	Seattle, Washington	American
Commercial Automotive Service, Inc.	Seattle, Washington	Commercial
Winthrop Motor Company.....	Tacoma, Washington	Winthrop
Riegel Brothers, Inc.....	Spokane, Washington	Riegel

The above-named defendants are hereinafter sometimes collectively referred to as the "corporate defendants."

4. The individuals listed below are hereby indicted and made defendants herein. Each is, and, during the period covered by this indictment, has been, associated with the corporate defendant indicated below. Each individual during the period covered by this indictment, which is wholly within the statute of limitations, has been actively engaged in the management, direction and control of the affairs, policies and acts of the corporate defendant with which he is associated, and the affairs, policies and acts of the Wholesalers Association and the MoPar Club, and in the said period has authorized, ordered or done the acts alleged herein to constitute the offense charged:

<u>Name</u>	<u>Address</u>	<u>Company with Which Associated</u>
W. G. Powell.....	Seattle, Washington	Savidge
John Munster.....	Seattle, Washington	Savidge
Stanley Sayers.....	Seattle, Washington	American
Ralph W. Hanson.....	Seattle, Washington	American
Frank L. Hawkins.....	Seattle, Washington	Commercial
Carl J. Brush.....	Seattle, Washington	Commercial
George W. Miller.....	Tacoma, Washington	Winthrop
Stanley Peterson	Tacoma, Washington	Winthrop
Dee R. Riegel.....	Spokane, Washington	Riegel
T. H. Naismith.....	Spokane, Washington	Riegel

5. Acts alleged in this indictment to have been done by a defendant corporation or association were authorized, ordered or done by its officers, directors, agents or employees, including the natural persons named as defendants herein.

III.

Nature of Trade and Commerce

6. The Chrysler Corporation, hereinafter referred to as "Chrysler," with its principal place of business in Detroit, Michigan, manufactures automobiles and trucks sold under the names Chrysler, DeSoto, Dodge and Plymouth. Chrysler manufactures replacement parts and engines to be used in the repair of said automobiles and trucks in plants located in the states of Michigan, Georgia, Kansas, Delaware and California. In excess of 25,000 different replacement parts are manufactured and sold by Chrysler. Chrysler divides said 25,000 replacement parts into two classes:

(a) Class A Parts—Items, such as piston rings and carburetors, which are competitive with similar interchangeable parts manufactured by companies other than Chrysler and sold by auto supply stores, garages, filling stations and other wholesale and retail outlets in competition with authorized Chrysler wholesalers and authorized Chrysler dealers.

(b) Class B Parts—Items, such as fenders, grills and bumpers which are manufactured and sold only by Chrysler and authorized Chrysler dealers and authorized Chrysler wholesalers.

7. Chrysler sells Chrysler replacement parts and engines to all persons and concerns, hereinafter referred to as "authorized Chrysler dealers," to whom it has granted a franchise to sell said automobiles and trucks, and to a limited number of said

persons and concerns, hereinafter referred to as "authorized Chrysler wholesalers," who, because of their geographical location, size and facilities for wholesale distribution of parts and engines, are granted franchises to act as wholesalers as well as retailers.

8. Authorized Chrysler wholesalers are not mere agents acting for Chrysler in the distribution of replacement parts and engines. By the terms of their franchise contracts with Chrysler, they are independent entrepreneurs engaged in the business of purchasing said parts and engines from Chrysler and reselling them as their own property. Said authorized Chrysler wholesalers sell said parts and engines to five classes of customers:

- (a) Authorized Chrysler dealers;
- (b) Owners of independent garages, repair shops, body rebuild shops and service stations who sell or install replacement parts or engines;
- (c) Fleet customers, such as cab companies, truck lines and other concerns using a number of vehicles in connection with their business;
- (d) Over-the-counter customers, not falling within any of the three previous categories, who purchase replacement parts or engines at retail; and
- (e) Repair department customers who have replacement parts or engines installed in their vehicles in the course of repairs made by the service departments of corporate defendants.

9. Authorized Chrysler dealers are likewise independent entrepreneurs engaged in the business of purchasing and reselling Chrysler replacement parts and engines. They purchase substantially all of their requirements of said parts and engines from authorized Chrysler wholesalers, and resell said engines and parts to the classes of customers described in subparagraphs 8 (b), (c), (d), and (e) above, in competition with authorized Chrysler wholesalers doing business in the same area.

10. The corporate defendants are the authorized Chrysler wholesalers in the state of Washington. In anticipation of, and in response to, orders and demands from customers in the state of Washington of the classes described in paragraph 8 hereof, the corporate defendants regularly order, purchase and procure the shipment of Chrysler replacement parts and engines from the Chrysler plants located in the states listed in paragraph 6 hereof, and resell said parts and engines to said customers in the state of Washington. Said corporate defendants, and authorized Chrysler dealers in the state of Washington to whom they sell, serve as a conduit through which said Chrysler replacement parts and engines move in a regular, continuous and uninterrupted flow to the ultimate users of said parts and engines in the state of Washington.

11. More than 90 per cent of the Chrysler replacement parts and engines used in the state of Washington are sold therein by the corporate de-

fendants. The dollar value of the Chrysler replacement parts and engines sold in the state of Washington by the corporate defendants during the period covered by this indictment exceeded \$9,000,000. The purchase and resale of Chrysler replacement parts and engines by the corporate defendants as the authorized Chrysler wholesalers for the state of Washington, and by the authorized Chrysler dealers to whom they sell, is an integral part of and incidental to the uninterrupted movement of said substantial volume of Chrysler replacement parts and engines in interstate commerce from the Chrysler plants located in the states listed in paragraph 6 hereof, to the ultimate users of said replacement parts and engines in the state of Washington.

IV.

The Conspiracy

12. Beginning in or about November 1946 and continuing thereafter to the date of the return of this indictment, the defendants herein named have engaged in an unlawful combination and conspiracy to fix, maintain and control prices and discounts applicable to the sale in the state of Washington of Chrysler replacement parts and engines produced in the states of Michigan, Georgia, Kansas, Delaware and California in unreasonable restraint of the interstate trade and commerce hereinbefore described and in violation of section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to

Protect Trade and Commerce Against Unlawful Restraint and Monopoly'' (25 Stat. 209, 15 U.S.C. 1), commonly known as the Sherman Act.

13. Said combination and conspiracy has consisted of a continuing agreement and concert of action among the defendants, the substantial terms of which have been:

(a) That the defendants raise, fix and agree upon the prices at which defendants sell Chrysler replacement parts and engines.

(b) That the defendants decrease, fix and agree upon discounts to be granted by defendants in the sale of Chrysler replacement parts and engines.

(c) That the defendants adhere to and maintain said agreed upon prices and discounts in the sale of Chrysler replacement parts and engines.

(d) That the defendants induce and compel authorized Chrysler dealers to whom they sell Chrysler replacement parts and engines to adhere to and maintain said agreed upon prices and discounts in the sale of said replacement parts and engines.

14. During the period of time covered by this indictment and for the purpose of forming and effectuating the said combination and conspiracy to unreasonably restrain the said interstate trade and commerce, the defendants, by agreement and concert of action, have done the things which, as hereinbefore alleged, they conspired to do, and more particularly have done, among others, the acts and things described in the paragraphs below.

15. On or about November 12, 1946, defendants agreed upon and made effective in western Washington a price increase on all Chrysler replacement parts and engines sold to all classes of customers set forth in paragraph 8 herein, except authorized Chrysler dealers, in the following amounts: an increase of 5 per cent in the price of all Class A Chrysler replacement parts, an increase of 15 per cent in the price of all Class B Chrysler replacement parts, and an increase of 5 per cent in the price of all Chrysler replacement engines. Defendants notified authorized Chrysler dealers to whom defendant corporations sold Chrysler replacement parts and engines of said agree-upon price increases, advised said dealers to increase their prices in like amounts, and furnished said dealers with computation tables prepared by defendants in order to insure adherence to and uniform computation of the increased prices.

16. In or about November 1947, defendants organized the defendant Wholesalers Association, in which each corporate defendant was, and is, represented. Thereafter, and throughout the period covered by this indictment, defendants supported, maintained and utilized defendant Wholesalers Association as an instrumentality for fixing, maintaining and controlling prices and discounts applicable to the sale of Chrysler replacement parts and engines. Throughout said period defendant Wholesalers Association conducted periodic meetings at which information concerning prices and discounts

applicable to the sale of Chrysler replacement parts and engines was exchanged and discussed and agreements reached by defendants with respect to uniform price and discount policies on future sales of said parts and engines.

17. On or about January 8, 1948, defendants agreed upon and made effective in western Washington an additional increase of 10 per cent in the price of all Class B Chrysler replacement parts sold to all classes of customers set forth in paragraph 8 herein, except authorized Chrysler dealers. At the same time, defendants agreed upon and made effective a 5 per cent reduction in the discount allowed independent garages, repair shops, body rebuild shops, service stations and fleet customers in the purchase of Chrysler replacement engines. Defendants notified authorized Chrysler dealers to whom defendant corporations sold Chrysler replacement parts and engines of said agree-upon price increase and discount reduction, advised said dealers to change their prices and discounts in like amounts, and furnished said dealers with computation tables prepared by defendants with respect to said price increase and discount reduction in order to insure adherence to and uniform computation of the increased prices and reduced discounts.

18. On or about March 1, 1948, defendants made effective in eastern Washington a price increase on all Chrysler engines and parts sold to all classes of customers set forth in paragraph 8 herein, except

authorized Chrysler dealers, in the following amounts: an increase of 5 per cent in the price of all Class A Chrysler replacement parts, an increase of 10 per cent in the price of all Chrysler Class B replacement parts, and an increase of 5 per cent in the price of all Chrysler replacement engines.

19. On or about March 19, 1948, the defendants organized the defendant MoPar Club, in which each corporate defendant, other than Riegel, was, and is, represented. Thereafter, and throughout the period covered by this indictment, defendants supported, maintained and utilized defendant MoPar Club as an instrumentality for fixing, maintaining and controlling prices and discounts applicable to the sale of Chrysler replacement parts and engines, and particularly as a means through which to induce and compel adherence by authorized Chrysler dealers to the prices and discounts agreed upon by defendants as aforesaid. Throughout said period defendant MoPar Club conducted monthly meetings, attended by representatives of the defendant corporations (other than Riegel) at which information concerning prices and discounts applicable to the sale of Chrysler replacement parts and engines was exchanged and discussed, agreements reached with respect to uniform price and discount policies on future sales of said parts and engines, and uniform price lists and computation tables distributed.

20. On or about July 19, 1948, defendants made effective, throughout the state of Washington, an

additional 5 per cent increase on all Chrysler replacement engines sold to all classes of customers set forth in paragraph 8 herein, except authorized Chrysler dealers. Defendants notified authorized Chrysler dealers to whom defendant corporations sold Chrysler replacement engines of said agreed-upon price increase, advised said dealers to increase their engine prices in like amounts, and furnished said dealers with price lists prepared by defendants which set forth said price increase in order to insure adherence to and uniform computation of the increased prices.

V.

Effects of the Combination and Conspiracy

21. The purpose, intent and necessary effect of the aforesaid combination and conspiracy has been and is:

(a) To eliminate all price competition among defendants and the authorized Chrysler dealers to whom they sell, in the sale of Chrysler replacement parts and engines shipped in interstate commerce into the state of Washington and sold and distributed therein, and to deny the consuming public in the state of Washington the benefits of such competition.

(b) To raise, fix and maintain the prices at which Chrysler replacement parts and engines shipped into the state of Washington in interstate commerce are sold in the state of Washington, and

particularly: to increase the prices of Class A Chrysler replacement parts by 5 per cent, and the gross profit margin of defendants on said parts from 66 per cent to in excess of 74 per cent; to increase the price of Class B Chrysler replacement parts by 25 per cent in western Washington and 10 per cent in eastern Washington, and the gross profit margin of defendants on said parts from 50 per cent to in excess of 87 per cent in western Washington, and from 50 per cent to 65 per cent in eastern Washington; to increase the price of Chrysler replacement engines by 10 per cent, and reduce the discount allowed independent garages, repair shops, service stations, and fleet customers in the purchase of said engines in western Washington by 5 per cent, and to increase the gross profit margin of defendants on said engines from 25 per cent to an average of approximately 40 per cent. Said increase in prices and reduction of discounts have increased the cost of replacement parts and engines to the purchasers thereof in excess of \$1,000,000 during the period covered by this indictment.

(c) To directly, substantially, and unreasonably burden and restrain the flow in interstate trade and commerce of Chrysler replacement parts and engines from the states of Michigan, Georgia, Kansas, Delaware and California to the state of Washington, by means of the aforesaid elimination of price competition, and the aforesaid enhancement, fixing and maintenance of prices.

VI.

Jurisdiction and Venue

22. The combination and conspiracy hereinabove alleged has been formed in part and carried out in part within the Northern Division of the Western District of Washington in that, among other things: Defendants have held meetings in Seattle, Washington, at which defendants have agreed upon uniform prices and discounts; defendants have prepared in Seattle, Washington, uniform price lists and computation tables which have been distributed to and used by defendants, and the authorized Chrysler dealers to whom they sell, in order to insure adherence to and uniform computation of said agreed-upon prices and discounts; defendants, and the authorized Chrysler dealers to whom they sell, have sold in the Seattle area Chrysler replacement parts and engines having a total dollar value in excess of \$5,000,000, at prices fixed pursuant to and in effectuation of the conspiracy.

A true bill:

/s/ THOMAS H. OLIN,

Foreman,

/s/ JAMES R. BROWNING,

Special Assistant to the

Attorney General,

/s/ AUTE L. CARR,

/s/ JOHN P. KELLY,

Attorneys,

/s/ HERBERT A. BERGSON,

Assistant Attorney General,

/s/ GEO. B. HADDOCK,
Special Assistant to the
Attorney General,
/s/ J. CHARLES DENNIS,
U. S. Attorney.

[Endorsed]: Filed Dec. 30, 1948.

[Title of District Court and Cause.]

DEFENDANTS' MOTION TO DISMISS

Come now the Defendants, Riegel Brothers, Inc., Dee R. Riegel, and T. H. Naismith, and move that the Indictment filed in this cause on the 4th day of January, 1949, be dismissed on the following grounds:

(1) Said Indictment does not allege any facts or charge the commission of any acts by these Defendants or either of them constituting an offense against the United States of America or the laws thereof, particularly Section 1 of the Act of Congress of July 2, 1890, as amended, commonly known as the Sherman Act (Title XV, U.S.C.A. Section 1).

(2) The Indictment does not allege facts sufficient to establish that these Defendants, or each or any of the defendants, have entered into any contract, agreement, combination, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, in violation of Section 1 of the Act of Congress of July 2, 1890, as

amended, commonly known as the Sherman Act (Title XV, U.S.C.A. Section 1).

(3) That the allegations of the Indictment are so vague, indefinite and uncertain that they do not inform these Defendants of the nature or cause of the accusations attempted to be stated against them as required by the fifth and sixth amendments to the Constitution of the United States.

(4) The allegations of the Indictment do not state with reasonable sufficiency or clarity the particular act or acts complained of as constituting the elements of the offense sought to be charged therein as to enable these Defendants to prepare a defense thereto, and therefore said Indictment, because of its vague, indefinite and uncertain allegations, does not sufficiently inform these Defendants of the nature or cause of the accusations made against them as required by the fifth and sixth amendments to the Constitution of the United States.

Dated this 5th day of February, 1949.

/s/ C. D. RANDALL,
of Randall & Danskin,
Attorneys for Defendants.

[Endorsed]: Filed Feb. 7, 1949.

[Title of District Court and Cause.]

Seattle, Washington,
February 28, 1949.

Before Honorable Sam M. Driver, United States
District Judge.

ARGUMENT BY MR. TRACY GRIFFIN ON
BEHALF OF THE DEFENDANTS

Mr. Griffin: If the Court please, all I know about an indictment is what the indictment says, and counsel for the defendants conferred in this matter, naturally, and there was some question as to whether this motion should be made at this time, all being of the opinion that the indictment does not state a cause of action, or whether as a matter of tactics it should await the hearing of the matter and ascertain if the trial court would exclude all evidence and limit it to the very limited charges of the indictment. On reading it, I at least was of the opinion that the government had deliberately drawn this indictment to ask this Court, or whoever might have it, to take one farther step in the matter of determining interstate commerce, because I conceived in reading it and re-reading it that it had been very carefully drawn. Time after time there was the language that this was all within the State of Washington, which at one time some years ago when there were state's rights, one would not have to read it two or three times, but realize immediately that there was no interference with the original conception of interstate commerce.

We all concluded that whether the indictment was so drawn or not to require this additional step, that it did not state a cause of action. It was our duty to present the matter now and dispose of it, and if the government was using this as a test, then they could proceed to have a higher court determine if the District Court should sustain the challenge, and the law would be settled without the necessity of a long extended trial. Counsel's argument leads me to the conclusion that the government must have that in mind, because, if I understood counsel for the government, he said, "It is the government's position that anything manufactured or produced without a state and brought into the state is in interstate commerce until it reaches the ultimate consumer". In other words, if that is the government's position, they're certainly asking your Honor to take a long, long step that the courts under a pleading of this kind have never as yet taken. I take it under their theory, if the Bon Marche and Frederick & Nelson and McDougal, Southwick & Rhodes determined to fix the price of safety pins by agreement, and that that is illegal, yet until those pins, one year, or five, or ten years from now, produced without the state, brought into their warehouses here, sold at retail, until they reached the ultimate consumer, under the government's theory they are all that period of time in interstate commerce, notwithstanding that they have been warehoused here and taxed here, because they've been out of interstate commerce under all the decisions. I can assume one other argument—safety pins may not

have been a good example, because I assume the government there used the "will hold" clause.

Now, with reference to paragraph 10, I'd like to read it to you, with regard to the allegations of the indictment: "That corporate defendants are the authorized Chrysler wholesalers in the State of Washington". Now, prior thereto they have alleged that these wholesalers are not agents of the Chrysler Corporation, but are independent entrepreneurs, organized and residing in the State of Washington, so what they say is that the corporate defendants, independent operators residing in the State of Washington, in anticipation of business that they expect to receive, and they say from customers in the State of Washington, order, purchase and procure, and by that they mean purchase these parts, and if you go to line 8, "and re-sell said parts and engines to said customers in the State of Washington".

That language to me there means and is plead definitely as intrastate business only, and the government having now taken the position, if I understood counsel correctly, and I believe I did, that their position is now that anything produced outside of the state and brought into the state remains in interstate commerce until it reaches the ultimate consumer, I suggest to you that that is a step that should not be taken, at least until the Supreme Court of the United States says that there are no state lines left.

RULING BY THE COURT ON DEFENDANTS'
MOTIONS TO DISMISS

Judge Driver: Well, the Court isn't assuming one way or other that this is a test case. I don't know what the government's intentions may be. The grand jury has indicted the defendants, and the Court will pass on this indictment in the light of the law as I see it, without regard to whether or not it is a test case. I'm not going to attempt any comprehensive review of the arguments made here; the question has been fully presented, but I'm, on either phase of this argument, or this question, rather, unable to distinguish the activities outlined in this indictment from the activities of an ordinary wholesaler, or on the question of whether it affects—whether the activities affected interstate commerce, I'm unable to distinguish it from the ordinary intrastate price fixing arrangement, and I don't believe that the court, that the Supreme Court or any Court of Appeals so far as I have been able to determine have gone quite as far as this indictment goes. I can't believe, as I see it, despite what we all know has happened so far as extending the reach of the interstate commerce power of Congress in recent years, I don't believe the Courts have gone to the position where you can say that every price fixing arrangement, purely intrastate, affects the interstate commerce because of that circumstance alone, and I don't believe that any of the courts have gone so far as to hold that ordinary and usual and normal wholesalers' operations constitute activities in interstate commerce.

I really feel that because of the, at least the closeness of this question, that it should be passed upon by an appellate court before there is a jury trial. I think the Court would be in a better position to rule on questions of evidence and instruct the jury if I knew, if this indictment is to be upheld, on what theory it is upheld, and if it is upheld only as to those activities that represent specific orders for particular customers if that is alleged here, or whether the appellate court regards the whole operation as in interstate commerce or affecting interstate commerce.

I was impressed by Mr. Griffin's analysis of this paragraph 10. It seems to me that reading it in the light of other allegations in the indictment here, it does no more than simply allege that these defendants in the State of Washington as wholesalers were ordering, as an ordinary wholesaler does, in anticipation of orders and contracts, and in response to orders and contracts, and that they weren't ordering as agents of Chrysler, but they were buying and selling again, that that is a completed transaction; they bought the goods, and it was shipped in there; they would pass then, I think, from interstate to intrastate commerce, and the succeeding sale would be intrastate commerce.

Now, if I'm wrong, it won't be the first time, and no doubt not the last, but I'm going to grant the motions, and you may send the order to me, I presume, to Spokane, because it won't be complicated at all, and there isn't any bail up in this case, is there? Well, I'll sus-

tain the motions and direct that the action be dismissed.

United States of America,
Western District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States in and for the Western District of Washington, for the cause of United States of America vs. Chrysler Corporation Parts Wholesalers, Northwest Region, et al, No. 47762. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, United States District Judge, held on February 28, 1949, at Seattle, Washington. That the above and foregoing contains a full, true and correct transcript of a portion of the argument and the court's ruling therein.

Dated this 1st day of March, 1949.

/s/ STANLEY D. TAYLOR,
Official Court Reporter.

[Endorsed]: Filed March 2, 1949.

[Title of District Court and Cause.]

ORDER DISMISSING INDICTMENT

This matter having come on for hearing before the undersigned Judge at 10:00 a.m., February 28, 1949, upon the Motions of the Defendants to dis-

miss the indictment herein, the United States of America, Plaintiff, being represented by its attorneys, Mr. Aute L. Carr and Mr. John P. Kelly, and the Defendants being represented by and through their counsel as follows: Defendants Chrysler Corporation Parts Wholesalers, Northwest Region and the Mopar Club by Ferguson, Burdell & Armstrong and Charles S. Burdell, which counsel appeared specially on behalf of said defendants and not otherwise; the Defendants S. L. Savidge, Inc., W. G. Powell and John Munster by Eggerman, Rosling & Williams and Edward Rosling; the Defendants American Automobile Company, Stanley Sayres and Ralph W. Hanson by Tracy Griffin and Kenneth Short; the Defendants Commercial Automotive Service, Inc., Frank L. Hawkins and Carl J. Brush by Bogle, Bogle & Gates, Robert W. Graham and J. Tyler Hull; the Defendants Winthrop Motor Company, George W. Miller and Stanley Peterson by Eisenhower, Hunter & Ramsdell and James V. Ramsdell; and the Defendants Reigel Brothers, Inc., Dee R. Reigel and T. H. Naismith by Randall & Danskin and Claude D. Randall; and the Court having considered the written briefs of counsel and having heard oral arguments, and the Court having heretofore announced its oral opinion at the conclusion of arguments on February 28, and being fully advised in the premises, it is therefore

Ordered, Adjudged and Decreed that the Defendants' Motions to dismiss the indictment herein

and all of them, be and the same are hereby granted,
and it is

Further Ordered, Adjudged and Decreed that the
indictment herein be and the same hereby is, dis-
missed.

Done in Open Court this 7th day of March, 1949.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ C. D. RANDALL,
One of Counsel for
Defendants.

Order approved as to form:

/s/ AUTE L. CARR,
/s/ JOHN P. KELLY.

[Endorsed]: Filed March 9, 1949.

[Title of District Court and Cause.]

CERTIFICATE

This will certify that the judgment of this Court
entered on March 9, 1949, dismissing the indict-
ment in the above-entitled case was based in part
upon the insufficiency of the indictment as a plead-
ing.

/s/ SAM M. DRIVER,
District Judge.

April 6th, 1949.

[Endorsed]: Filed April 6, 1949.

[Endorsed]: No. 12236. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Chrysler Corporation Parts Wholesalers, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 9, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The United States of America hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment of the United States District Court for the Western District of Washington, entered on March 9, 1949, dismissing the indictment which charged a violation of Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to Protect Trade and Commerce Against Unlawful Restraint and Monopoly," (25 Stat. 209, 15 U.S.C. 1), commonly known as the Sherman Act. The judgment of the District Court dismissing the indictment is based in part upon the insufficiency of the indictment as a pleading to allege an offense within

the scope and meaning of the Sherman Act.

Dated April 6th, 1949.

/s/ CHARLES L. WHITTINGHILL,
Trial Attorney, Antitrust Div., Dept. of Justice,
Attorney for Plaintiff.

In the United States Court of Appeals
for the Ninth Circuit

No. 12236

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CHRYSLER CORPORATION PARTS WHOLE-
SALEERS, NORTHWEST REGION, et al.,
Defendants.

DESIGNATION OF RECORD ON APPEAL

United States of America, appellant herein, designates the following portions of the record and proceedings in the above cause which are material to the consideration of the appeal.

1. The criminal indictment.
2. Motions of defendant to dismiss the indictment.
3. The opinion of the district court, dated March 1, 1949.
4. The order of the district court, dated March 7, 1949, and entered March 9, 1949, dismissing the indictment.

5. Certificate of the district court setting forth grounds for its judgment, signed April 6, 1949.
6. Notice of appeal, filed April 6, 1949.
7. Statement of points upon which appellant will rely.
8. This designation.

Dated May 19, 1949.

/s/ CHARLES S. WHITTINGHILL,
Trial Attorney, Antitrust Division, Department of
Justice, Attorney for Appellant, United States
of America.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

The appellant intends to rely on the following points on appeal:

1. The district court erred in holding that the allegations of the indictment do not set forth a combination or conspiracy in restraint of interstate, as distinguished from intrastate, trade and commerce.

2. The district court erred in so far as it held that, under the allegations of the indictment, the defendant wholesalers are not engaged in interstate activity when they sell to customers within the State of Washington goods which the defend-

ant wholesalers have purchased and procured from outside the State of Washington in response to prior orders from such customers.

3. The district court erred in ignoring, or in failing to give effect to, the allegation of paragraph 10 of the indictment that the "corporate defendants, and authorized Chrysler dealers in the State of Washington to whom they sell, serve as a conduit through which said Chrysler replacement parts and engines move in a regular, continuous, and uninterrupted flow to the ultimate users of said parts and engines in the State of Washington."

4. The district court erred in so far as it held that, under all the allegations of the indictment, the purchase by the defendant wholesalers of Chrysler parts and engines from plants located outside the State of Washington and the sale by the said wholesalers of such parts and engines to purchasers within the State are separate, completed transactions so insulated from each other that defendants' combination and conspiracy to fix, maintain and control prices and discounts applicable to such sales does not burden and restrain the interstate purchase and procurement of said parts and engines.

5. The district court erred in ignoring, or in failing to give effect to, the allegations of paragraph 21 of the indictment that the purpose, intent and necessary effect of the combination and conspiracy charged in the indictment has been and is to directly, substantially and unreasonably bur-

den and restrain the flow in interstate commerce of Chrysler replacement parts and engines from states other than Washington to the State of Washington.

Dated May 19, 1949.

/s/ CHARLES L. WHITTINGHILL,
Trial Attorney, Antitrust Division, Department of
Justice, Attorney for Plaintiff, United States
of America.

No. 12,236

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

CHRYSLER CORPORATION PARTS WHOLESALERS NORTH-
WEST REGION, MoPAR CLUB, S. L. SAVIDGE, INC.,
AMERICAN AUTOMOBILE COMPANY, COMMERCIAL AUTO-
MOTIVE SERVICE, INC., WINTHROP MOTOR COMPANY,
RIEGEL BROTHERS, INC., W. G. POWELL, JOHN MUN-
STER, STANLEY SAYRES, RALPH W. HANSON, FRANK L.
HAWKINS, CARL J. BRUSH, GEORGE W. MILLER, STAN-
LEY PETERSON, DEE R. RIEGEL, T. H. NAISMITH, AP-
PELLEES

BRIEF FOR APPELLANT



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,236

UNITED STATES OF AMERICA, APPELLANT

v.

CHRYSLER CORPORATION PARTS WHOLESALERS NORTH-
WEST REGION, ET AL., APPELLEES

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The indictment returned in the United States District Court for the Western District of Washington, Northern Division against the appellees on December 30, 1948 charges a violation of Section 1 of the Sherman Act (26 Stat. 209; 15 U.S.C. 1) in that the appellees engaged in an unlawful combination and conspiracy to fix, maintain and control prices and discounts applicable to the sale in the State of Washington of Chrysler replacement parts and engines produced outside the State of Washington (R. 3). Jurisdiction in the District Court was based on 18 U.S.C. 3231. The defendants filed motions to dismiss the indictment, and, following hearing, the District Court on March 19, 1949 rendered an oral opinion (R. 22), which is set forth in full at p. 6 herein, and entered an order dismissing the indictment (R. 24). From that order appellant has taken this appeal.

Since the District Court has certified that its decision was not based solely upon the validity or construction

of the statute upon which the indictment is founded, but rather was based in part upon the insufficiency of the indictment as a pleading (R. 26), appeal has been taken to this Court in accordance with the provisions of 18 U.S.C. 3731.

STATUTE INVOLVED

Section 1 of the Act of July 2, 1890, commonly known as the Sherman Act, 26 Stat. 209, as amended by 50 Stat. 693, 15 U.S.C. 1, provides in part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.

STATEMENT OF THE CASE

The appellees consist of five corporations, comprising all of the wholesalers of replacements parts and engines for Chrysler-built automobiles in the State of Washington; ten individuals who are officers of these five corporations; and two trade associations, the creatures of the five corporate appellees, one of which is an association of these five corporations, and the other of which is an association of four of these corporations and retail Chrysler dealers in the State of Washington (R. 3). The five corporate wholesalers purchase all replacement parts and engines from Chrysler Corporation manufacturing subsidiaries located outside of the State of Washington, and together they purchase 90% of such parts and engines sold in the State of Washington. The corporate wholesalers sell to consumers of these parts and engines—that is, persons owning automobiles who are the ultimate users—and also sell to Chrysler dealers within the State of Washington who, in turn, sell to consumers. The corporate appellees thus engage in both a retail and a wholesale business.

The appellees have combined and conspired to fix and control the price to consumers in the State of Washing-

ton of all Chrysler replacement parts and engines. They have succeeded in effectuating this conspiracy, with the result that prices of parts and engines have been raised four times during the two-year period covered by the indictment, an increase in the cost of such parts and engines to consumers in excess of \$1,000,000.

Summary of the Indictment

The indictment, which appears in the record at p. 3, may be summarized as follows:

Paragraphs 1 through 5 identify and describe the five corporate defendants, the individual defendants (each of whom is an officer or manager of one of the corporate defendants), and the two defendant trade associations.

Paragraphs 6 through 11 describe the nature of the trade and commerce which is the subject of the price fixing agreement. It is pointed out that replacement parts and engines used in the repair of Chrysler, DeSoto, Dodge and Plymouth automobiles and trucks are manufactured by Chrysler Corporation in factories outside the State of Washington. The five corporate defendants are the only authorized wholesalers of Chrysler parts and engines located within the State of Washington. These companies are independent entrepreneurs engaged in purchasing parts and engines from Chrysler plants outside the state, bringing them into the State of Washington, and distributing them at both wholesale and retail levels. It is alleged in paragraph 10 that the corporate defendants regularly order, purchase and procure the shipment of Chrysler replacement parts and engines from Chrysler plants in other states for the purpose of filling two distinct needs.

First, drawing upon past sales experience, these companies anticipate probable sales in the immediate future and have parts and engines regularly coming in from

out-of-state plants so as to meet dealer and consumer demands as they arise.

Second, in response to orders already on hand from dealers and consumers, defendant corporations procure shipments from Chrysler plants outside the state of parts or engines, which are intended exclusively for specific dealers or consumers, and are delivered to them upon arrival at defendants' places of business.

It is alleged that the defendant wholesalers thus serve as a conduit through which Chrysler replacement parts and engines move in regular, continuous and uninterrupted flow from out-of-state plants to the ultimate users of said parts and engines in the State of Washington. More than 90% of the Chrysler replacement parts and engines used in the State of Washington, having a dollar value of more than \$9,000,000 in the two-year period covered by the indictment, were sold at wholesale or retail by the corporate defendants (pars. 10, 11).

Beginning with paragraph 12, the alleged conspiracy is set forth in detail. The defendants are charged with having entered into an unlawful combination and conspiracy to fix, maintain and control prices and discounts applicable to the sale within the State of Washington of Chrysler Corporation replacement parts and engines produced in other states, in unreasonable restraint of interstate commerce and in violation of Section 1 of the Sherman Act.

Paragraph 13 enumerates the terms of the agreement, namely, that defendants agreed to:

1. Raise the prices of replacement parts and engines;
2. Decrease discounts granted in the sale of parts and engines;
3. Adhere to the prices and discounts agreed upon;

4. Induce and compel authorized Chrysler dealers, to whom they sell parts and engines, to adhere to the agreed-upon prices and discounts.

After describing the alleged unlawful price-fixing conspiracy, the indictment proceeds to set forth specific overt acts done by the defendants in carrying out the purposes of the illegal conspiracy. Four separate price increases on parts or engines made effective by corporate defendants during the period November 1946 through July 1948 are identified by the date when the increase was put into effect, the amount of the increase, the area in which the increase was made effective, and the efforts of defendants to bring Chrysler Corporation dealers into line with the agreed-upon increases (pars. 15, 17, 18, 20). The organization by the corporate and individual defendants of the defendant trade associations, MoPar Club and Parts Wholesalers' Association, and their use as instrumentalities for fixing, maintaining and controlling prices is also described.

Paragraph 21 describes the effects of the combination and conspiracy, both upon interstate commerce and upon consumers within the State of Washington. It is alleged that defendants increased their gross profit margin on Class A parts from 66 per cent to more than 74 per cent; on Class B parts from 50 per cent to more than 87 per cent in western Washington, and from 50 per cent to 65 per cent in eastern Washington; and on engines from 25 per cent to 40 per cent, with a resulting increase in the cost of replacement parts and engines to purchasers thereof in excess of \$1,000,000 during the two-year period of the indictment. It is further alleged that the elimination of price competition and the substantial increase in prices pursuant to the conspiracy was intended to and did unreasonably burden and restrain the flow of replacement parts and engines in

interstate commerce from Chrysler plants in other states into the State of Washington.

Paragraph 22 sets forth appropriate allegations of overt acts within the Western District of Washington, Northern Division, to establish jurisdiction and venue.

Proceedings Below

The defendants filed motions to dismiss the indictment, asserting, *inter alia*, that the indictment fails to charge a crime, that it fails to allege facts constituting the offense, and that the indictment is defective because duplicitous, and because vague and indefinite (R. 17).

Following argument and the presentation of briefs, the District Court, on March 9, 1949, issued an order granting all of the defendants' motions and dismissing the indictment. Judge Driver rendered an oral opinion as follows (R. 22):

Opinion of the District Court

Well, the Court isn't assuming one way or the other that this is a test case. I don't know what the government's intentions may be. The grand jury has indicted the defendants, and the Court will pass on this indictment in the light of the law as I see it, without regard to whether or not it is a test case. I'm not going to attempt any comprehensive review of the arguments made here; the question has been fully presented, but I'm, on either phase of this argument, or this question, rather, unable to distinguish the activities outlined in this indictment from the activities of an ordinary wholesaler, or on the question of whether it affects—whether the activities affected interstate commerce, I'm unable to distinguish it from the ordinary intrastate price fixing arrangement, and I don't believe that the court, that the Supreme Court or any Court of Appeals so far as I have been able to determine have gone quite as far as this indictment goes. I can't believe, as I see it, despite what we all know has happened so far as extending the reach of the inter-

state commerce power of Congress in recent years. I don't believe the Courts have gone to the position where you can say that every price fixing arrangement, purely intrastate, affects interstate commerce because of that circumstance alone, and I don't believe that any of the courts have gone so far as to hold that ordinary and usual and normal wholesalers' operations constitute activities in interstate commerce.

I really feel that because of the, at least the closeness of this question, that it should be passed upon by an appellate court before there is a jury trial. I think the Court would be in a better position to rule on questions of evidence and instruct the jury if I knew, if this indictment is to be upheld, on what theory it is upheld, and if it is upheld only as to those activities that represent specific orders for particular customers if that is alleged here, or whether the appellate court regards the whole operation as in interstate commerce or affecting interstate commerce.

I was impressed by Mr. Griffin's analysis of this paragraph 10. It seems to me that reading it in the light of other allegations in the indictment here, it does no more than simply allege that these defendants in the State of Washington as wholesalers were ordering, as an ordinary wholesaler does, in anticipation of orders and contracts, and in response to orders and contracts, and that they weren't ordering as agents of Chrysler, but they were buying and selling again, that that is a completed transaction; they bought the goods, and it was shipped in there; they would pass then, I think from interstate to intrastate commerce, and the succeeding sale would be intrastate commerce.

Now, if I'm wrong, it won't be the first time, and no doubt not the last, but I'm going to grant the motions, and you may send the order to me, I presume, to Spokane, because it won't be complicated at all, and there isn't any bail up in this case, is there? Well, I'll sustain the motions and direct that the action be dismissed.

QUESTIONS PRESENTED

1. Whether a conspiracy between all the wholesalers in the State of Washington, their officers, and two trade associations, to fix prices to consumers of Chrysler-made parts and engines all of which are purchased outside of the state, is a restraint of commerce within the scope of the Sherman Act.

2. Whether the indictment is sufficient as a pleading.

a. Whether the indictment charges a crime.

b. Whether the indictment alleges facts constituting a violation of the Sherman Act.

c. Whether the indictment is fatally duplicitous.

d. Whether the indictment is fatally vague and indefinite.

SPECIFICATION OF ERRORS

1. The district court erred in holding that the allegations of the indictment do not set forth a combination or conspiracy in restraint of interstate, as distinguished from intrastate, trade and commerce.

2. The district court erred in so far as it held that, under the allegations of the indictment, the defendant wholesalers are not engaged in interstate activity when they sell to customers within the State of Washington goods which the defendant wholesalers have purchased and procured from outside the State of Washington in response to prior orders from such customers.

3. The district court erred in ignoring, or in failing to give effect to, the allegation of paragraph 10 of the indictment that the "corporate defendants, and authorized Chrysler dealers in the State of Washington to whom they sell, serve as a conduit through which said Chrysler replacement parts and engines move in a regular, continuous, and uninterrupted flow to the ultimate users of said parts and engines in the State of Washington."

4. The district court erred in so far as it held that, under all the allegations of the indictment, the purchase by the defendant wholesalers of Chrysler parts and engines from plants located outside the State of Washington and the sale by the said wholesalers of such parts and engines to purchasers within the State are separate, completed transactions so insulated from each other that defendants' combination and conspiracy to fix, maintain and control prices and discounts applicable to such sales does not burden and restrain the interstate purchase and procurement of said parts and engines.

5. The district court erred in ignoring, or in failing to give effect to, the allegation of paragraph 21 of the indictment that the purpose, intent and necessary effect of the combination and conspiracy charged in the indictment has been and is to directly, substantially and unreasonably burden and restrain the flow in interstate commerce of Chrysler replacement parts and engines from states other than Washington to the State of Washington.

SUMMARY OF ARGUMENT

I

Appellees' conspiracy to fix consumer prices for Chrysler parts and engines purchased outside of the State of Washington is in illegal restraint of interstate commerce. It is settled that such a price fixing combination is an illegal restraint of trade *per se*, *United States v. Socony-Vacuum Co.*, 310 U. S. 150. Under the circumstances of this case, the restraint is *in* and *affecting* interstate commerce within the scope of the antitrust laws. The Sherman Act exercises the full constitutional power of the commerce clause, *United States v. Frankfort Distilleries*, 324 U. S. 293, 298. In asserting that their activities are not subject to federal regulation, appellees ignore the realities of our integrated

national economy, *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1, 41. The automobile industry, one of the nation's largest, is an interstate industry upon which all sections of the country are dependent. Parts for the maintenance of automobiles are an integral portion of this industry and move in interstate trade. A restraint on this industry, whether in the production, transportation, or distribution of its products, is within the federal power to control.

First, appellees' conspiracy to fix consumer prices of Chrysler parts is a restraint *in* interstate commerce. They purchase goods in other states and resell to consumers within the state at fixed prices. These sales are both in response to prior orders of customers and in anticipation of future orders. The distribution of these goods is as essential a part of their interstate movement as the production of them, and control of their sale prices in the state of destination restrains this commerce, *Local 167 v. United States*, 291 U. S. 293, 297. Consumer sales cannot be amputated from the entire series of interstate transactions. Commerce in these parts must be viewed as an integrated whole. *United States v. General Motors Corp.*, (C.C.A. 7, 1941) 121 F. (2d) 376, cert. den. 314 U. S. 618. Even under those cases interpreting the Fair Labor Standards Act, a statute of more limited scope, appellees' restraint is in commerce, for the goods upon which prices were fixed were received from other states to fill prior orders and the anticipated requirements of stable customers. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Federal Trade Commission v. Pacific Paper Ass'n*, 273 U. S. 52. In *United States v. General Motors Corp.*, *supra*, the Court stated that the interstate commerce in automobiles is "that from the manufacturer, through the dealers, to the ultimate consumer."

Second, appellees' conspiracy comes within the provisions of the Sherman Act even if it is not deemed to be in commerce itself, for the Act encompasses all restraints which affect interstate commerce. Purely local activities are subject to regulation if they injuriously affect interstate commerce. *United States v. Wrightwood Dairy Co.*, 315 U. S. 110; *United States v. Women's Sportswear Manufacturers Ass'n*, 336 U. S. 460. This Court, in *Food and Grocery Bureau v. United States*, 139 F. (2d) 573 (1943), held a conspiracy to fix retail grocery prices in California to be a violation of the Sherman Act. The same type of restraint has been imposed in the case at bar. Businesses similar to those restrained and conducted by appellees often have been held subject to federal regulation under the commerce clause in cases involving the National Labor Relations Act, a statute having coverage comparable to the Sherman Act. This Court in *N.L.R.B. v. Van De Kamp's, etc., Bakers*, 152 F. (2d) 818 (1946), determined commerce to be affected in the case of a bakery purchasing 30% of its materials outside the state, and selling all of its products within the state. To the same effect is the decision of this Court in *N.L.R.B. v. Ellis-Klatscher & Co.*, 142 F. (2d) 356 (1944). In the light of the decisions of the last fifteen years and of any realistic understanding of our national economy, the conclusion is inevitable that appellees have conspired to impose a restraint which affects interstate commerce within the meaning of the Sherman Act.

II

The indictment is sufficient as a pleading in charging, clearly and specifically, a conspiracy in violation of the Sherman Act. It amply informs the appellees of the nature of the charge, as provided by Rule 7(c) of the Federal Rules of Criminal Procedure. *United States v.*

Achtner, 144 F. (2d) 49 (C.C.A. 2, 1944); *United States v. American Medical Ass'n.*, 110 F. (2d) 703 (App. D. C., 1940), cert. den. 310 U. S. 644. The plain language of the indictment permits of no misunderstanding of the crime charged, and of when and how appellees are alleged to have carried it out. The conspiracy is described specifically as a concert of action among the appellees to fix prices for the sale to consumers of Chrysler replacement parts and engines by the appellee wholesalers, as well as to compel and induce the dealers to whom they also sold to maintain the identical fixed prices in consumer sales. The indictment names dates on which agreements were reached to raise prices on parts and engines, specifies the amounts of the increases, and alleges that uniform price lists were sent to dealers. The dates of organizing the appellee trade associations are specified, and their activities, through which the conspiracy was effectuated, are described. This recitation of facts leaves no possibility of misunderstanding as to the conspiracy charged. Indeed, it goes further than required, for conspiracies under the Sherman Act may be alleged with less particularity than is required in an indictment for other types of criminal conspiracy. *Nash v. United States*, 229 U. S. 373, 378; *Eastern States Lumber Ass'n. v. United States*, 234 U. S. 600, 612.

The indictment charges but one offense—the conspiracy to fix consumer prices of these goods. The addition of descriptive facts regarding the means used to commit the offense assists appellees in identifying it. *Silkworth v. United States*, 10 F. (2d) 711 (C.C.A. 2, 1926), cert. denied, 271 U. S. 664.

The indictment is as specific and definite as the circumstances permit and the law requires. Less definite indictments have been sustained often. *United States v. Frankfort Distilleries*, 144 F. (2d) 824 (C.C.A. 10,

1944), partly reversed on another question, 324 U. S. 293, certiorari denied as to this question *sub nom.* *Safeway Stores, Inc. v. United States*, 323 U. S. 768. *United States v. Tarpon Springs Sponge Exchange*, 142 F. (2d) 125 (C.C.A. 5, 1944).

ARGUMENT

I

Appellees' Conspiracy to Fix Consumer Prices for Chrysler Parts and Engines Shipped Into Washington from Other States Is in Illegal Restraint of Interstate Commerce

The five corporate appellees are all of the wholesalers in Washington of replacement parts and engines for Plymouth, Dodge, DeSoto and Chrysler automobiles. They purchase all such parts and engines from Chrysler manufacturing subsidiaries in other states. They handle 90 percent of the business in these items within the State of Washington. They sell both to consumers and to dealers who, in turn, sell to customers.

These wholesalers, their officers, and the two trade associations which are their creatures have combined and conspired to fix and raise the prices to consumers of these parts and engines. That this conspiracy succeeded is reflected in the fact that consumer prices for these items were raised four times during the period covered by the indictment, resulting in a cost to the consumers in the State of Washington of more than \$1,000,000.

It is settled that a conspiracy to fix prices is an unreasonable restraint of trade *per se*. *United States v. Trenton Potteries Co.*, 273 U. S. 392; *United States v. Socony-Vacuum Co.*, 310 U. S. 150. None the less appellees contend, and the Court below held, that this price-fixing combination is so remote in its operation and effect upon interstate commerce as to be beyond the scope of Congressional authority acting to the full limit

of the Commerce Clause. We submit that this contention is plainly without merit and unsupported by any decision of the Supreme Court within recent years. We will discuss subsequently the precedents and principles applicable in demonstrating that appellees' conduct has such an impact upon interstate commerce as to bring it within the reach of the Commerce Clause as applied through the Sherman Antitrust Act. But at the outset we would like to emphasize that appellees' contention ignores the realities of our integrated national economy and the mutual dependency of all parts of the country for these products.

These parts and engines are not only an integral part of the automobile industry, but are intimately connected with and essential to the continued maintenance of Chrysler automobiles, one of the three largest of such manufacturers. Automobiles made in Detroit are distributed and used in the farthest reaches of the country. Parts for the maintenance of these automobiles follow also in the channels of interstate commerce. Those involved in this litigation happen to have been manufactured in Michigan, Georgia, Kansas, Delaware, and California. If this flow is throttled, whether at the outset of its journey by cutting down production, while it is in transit by impeding its movement, or at its destination by restricting its distribution, the effect, without question, is upon interstate commerce primarily and immediately. It is against all reason to assert that a small group in one state has the power by a concerted fixing of prices to regulate the market for products of such an integrated national industry. "We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum . . . When industries organize themselves on a national scale, making their relation to interstate commerce the dominant fac-

tor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce . . .” *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 301 U. S. 1, 41-42. These comments are equally applicable to the price-fixing restraint created by appellees.

By conspiring to fix the prices on these Chrysler parts appellees place an impediment in the way of their free distribution to the consumer market. Their control over these goods is as effective as that of a man holding the nozzle of a garden hose. By applying some pressure with his thumb, less water escapes, and if he applies enough pressure he can stop the flow as readily as turning off the faucet. Similarly, the actions of appellees put reverse pressure on the flow of goods through the channels of interstate trade, with an impact directly back to the manufacturer and harmful effect on the industry as a whole.

The scope of the Sherman Act is that of the commerce clause itself. “With reference to commercial trade restraints such as [the act reaches], Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it ‘exercised all the power it possessed.’ ” *United States v. Frankfort Distilleries*, 324 U. S. 293, 298; *United States v. Southeastern Underwriters Association*, 322 U. S. 533, 558-559. Thus, the question here presented is, at bottom, not merely the construction of a statute but whether, acting to the extent of its constitutional power, the Federal Government can reach a conspiracy to fix prices to consumers of goods which are produced outside of the state and shipped to the conspirators in the state. It is settled that the scope of the Sherman Act does not depend upon whether the restraint occurs “in” interstate commerce

or whether, while not “in” interstate commerce, it “affects” interstate commerce to a sufficient extent to subject it to the Federal authority. The Sherman Act is broad enough to include both restraints in commerce and restraints affecting commerce. It suffices that either situation be demonstrated. It is the Government’s view that this combination to fix consumer prices falls within both definitions, and that the restraint not only has affected interstate commerce substantially, but also is a restraint in interstate commerce itself.

A. Appellees’ conspiracy to fix consumer prices of Chrysler parts is a restraint in interstate commerce

The corporate appellees purchased these Chrysler parts outside the State of Washington, and received them within the State of Washington upon shipment across the state line. It will be noted that they engaged in two types of sales: to consumers, at the prices fixed by their conspiracy, and second, to retail Chrysler dealers at unfixed prices. The dealers, in turn, sell to consumers at the prices fixed identically by appellees’ conspiracy.

Again, the corporate wholesalers purchased from their out-of-state suppliers under two circumstances: first, they purchased in response to orders and demands from customers, and second, they purchased in anticipation of orders and demands of customers. The plain and indisputable meaning of “in response to orders and demands from customers” is that these wholesalers were undertaking to fill prior orders which they had on their books. The meaning of “in anticipation of orders and demands from customers” is necessarily predicated upon an anticipated and calculated market for the goods.

Arguendo, we may concede that the conspiracy itself is local in the sense that it was entered into between persons located within the state, and that the prices fixed on the goods were for the sale to local consumers. The geographical location of these two factors is of no legal effect in determining the scope of the Sherman Act. The conspiracy projects itself in interstate commerce whether or not the conspirators are situated intrastate, and the price imposed on the goods, as a result of the conspiracy, is imposed during their interstate journey even though it is the local consumers who pay.

Appellees' attempt to truncate the interrelated elements of a great interstate industry is supported by neither law nor logic. The interstate aspect of commerce in Chrysler parts encompasses production, transportation, and distribution. Distribution, at one end of this process, is as essential an element as production at the other, for, if distribution is clogged, the manufacturer will reduce output and the railroads carry less goods. By restraining the market for parts and engines in one state, appellees have slowed, and stopped in part, this interstate movement.

These appellees have created a price barrier over which the goods must climb in order to reach the consumer market. Four times they have raised the barrier so that the climb has become increasingly more difficult.¹ And this price barrier is attached to the goods directly they come into the hands of the corporate wholesalers, who receive them by interstate purchase, for as soon as received they are bound by the terms of the conspiracy.

¹ Appellees' conspiracy is, of course, equally invalid whether it had the effect of raising or lowering prices. *Standard Oil Co. v. United States*, 221 U.S. 1, 48. The Sherman Act provided that competition should be the law of business, and the Act will not be judicially repealed by any assertion that trade-restraining practices produce economic benefits. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221; *United States v. Union Pacific R. Co.*, 226 U.S. 61.

The parts cannot move on from these wholesalers to the consumer except by carrying the added burden of this indenture. It is thus clear that this price burden—the very product of the illegal conspiracy—is attached to the goods while they are actually in interstate commerce. As soon as the parts are received by the wholesaler in the course of the interstate journey, they are subjected to this restriction imposed on the onward movement to consumers. In a practical business sense, this restraint operates as more than a price restriction imposed on the goods while they travel from manufacturer to consumer. It also operates as a prior restraint on the commerce before the goods are shipped or even purchased. For, having entered into this conspiracy to fix consumer prices on all future purchases, the appellees can make no purchases in other states that are not subjected, in advance, to this restriction. When appellees go to the foreign vendor to negotiate, their purchases are limited in advance by the requirement of a fixed price on resale to consumers. Such a purchaser does not enter the market-place as a free trader, and the resultant regimentation of out-of-state purchases by the appellee wholesalers is clear.

The trade of shippers of such products was clearly restrained when, by reason of the conspiracy, these shippers were compelled to sell in a market in which resale price competition among the purchasers of their goods was wholly or partially suppressed. *Local 167 v. United States*, 291 U. S. 293, 297; *Swift & Co. v. United States*, 196 U. S. 375, 398. Similar facts have been held to support a finding of restraint of interstate commerce. *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52. In the *Local 167* case, the Supreme Court said (291 U. S. at p. 297) :

The control of the handling, the sales and the prices at the place of origin before the interstate

journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce. * * *.

“Commerce among the states,” said Mr. Justice Holmes, “is not a technical legal conception, but a practical one, drawn from the course of business.” *Swift & Co. v. United States*, 196 U. S. 375, 398; *United States v. Yellow Cab Company*, 332 U. S. 218. Any attempt to separate the sale of parts and engines at wholesale or retail from the entire chain of commerce from Chrysler Corporation plants in other states to retail outlets and to consumers in the State of Washington would be patently artificial and unrealistic. As the Supreme Court stated in *United States v. Southeastern Underwriters Ass’n*, 322 U. S. 533, at page 537:

True, many of the activities described in the indictment which constituted this chain of events might, if conceptually separated from that from which they are inseparable, be regarded as wholly local. But the District Court in considering the indictment did not attempt such a metaphysical separation.

In *United States v. General Motors Corp.*, 121 F. (2d) 376 (C. C. A. 7, 1941), cert. denied, 314 U. S. 618, another conspiracy affecting interstate commerce by restraining retail sales was found to be a violation of the Sherman Act. The object of the conspiracy was to induce dealers to require their retail customers to finance their purchases of automobiles through General Motors Acceptance Corporation. The Government rested its case on the theory that the restraint was on the sales of automobiles. At that time new cars were bought in quantity by dealers and sold from stock (*Id.* at 387-388). Commenting on the argument that the commerce restrained was the retail sale, the Court stated:

Now it is quite impossible to consider the interdependent retail market and the wholesale market as one apart from the other, for obviously without the retail sale there could be no wholesale transaction. Any restraints which affect the wholesale market must be reflected in the retail sales and, likewise, any restraints affecting the retail market necessarily affect the wholesale transactions. (p. 398)

The true perspective is to be drawn from the whole picture, and the interstate commerce involved in this case is that from the manufacturer, through the dealers, to the ultimate consumer. Even assuming that the only interstate commerce involved is the movement of cars from the factory to the dealers, a restraint imposed upon the movement of cars from the dealers to the retail public would necessarily affect the shipment and movement of the cars while unquestionably they are in interstate commerce, and consequently we need not really decide when the interstate commerce ends and that which is intrastate commerce begins. (pp. 401-402)

In *Federal Trade Commission v. Pacific Paper Assn.*, 273 U. S. 52, similar transactions were held to be in interstate commerce. In that case wholesalers, in response to orders from customers, ordered paper from a mill. The wholesaler paid for the goods and received the bill of lading; there were no contractual relations between his customer and the mill. The shipment from the mill was sometimes consigned to the wholesaler, who took possession of the goods and later delivered to his customer, and sometimes consigned to the customer, in which case the customer took delivery. The Court held that in either event the transactions were *in* interstate commerce. It was said to be immaterial whether the goods were delivered to the wholesaler or his customer. In all instances, the relations between the wholesaler and his customer occurred within one state; further, the wholesaler was free to supply goods from a mill out-

side of the state, or from one inside. When he elected to order from a mill outside of the state, the sale by the wholesaler to his customer became a part of interstate commerce.

It should be noted that in the *Pacific Paper* case, not only was the commerce involved like that in the present case, but the restraint applied thereto was identical—fixing the price in the transaction between the wholesaler and his customer.

A significant comparison is found in those cases arising under the Fair Labor Standards Act (52 Stat. 1060, 29 U. S. C. 201). That statute is of considerably narrower scope than the Sherman Act, since it covers only employment “in” interstate commerce and in production for commerce, not the entire field of the Federal commerce power.

In *Walling v. Jacksonville Paper Company*, 317 U. S. 564, the respondent was engaged in the wholesale paper business, purchasing most of its paper from mills outside the state and reselling to customers within the state. As in the *Pacific Paper* case, two separate contracts existed and there were no business relations whatever between the wholesaler’s customer and the mill. In both cases, as in the present case, the transaction between the wholesaler and his customer occurred entirely within one state. The Court in the *Jacksonville* case ruled that paper purchased to fill a special order of a customer or to meet the particular needs of specified customers was in interstate commerce although there was a “temporary holding of the goods” at the respondent’s warehouse. The Court held that employees handling such goods were engaged “in commerce” although the goods were unloaded at the wholesaler’s warehouse and temporarily held before being sent on to the customer. The Court said (p. 569):

The fact that respondent may treat the goods as stock in trade or the circumstance that title to the

goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate.

Other cases holding that handling and delivering goods received from other states to fill prior orders or the anticipated requirements of stable customers constitute engaging in commerce, within the meaning of the Fair Labor Standards Act, are *Walling v. Mutual Wholesale Food & Supply Company*, 141 F. (2d) 331 (C.C.A. 8, 1944); *Mid-Continent Petroleum Corp. v. Keen*, 157 F. (2d) 310, 314 (C.C.A. 8, 1946); *Walling v. American Stores Company*, 133 F. (2d) 840, 845-846 (C.C.A. 3, 1942); *A. H. Phillips, Inc. v. Walling*, 144 F. (2d) 102, 104 (C.C.A. 1, 1944); *Montgomery Ward & Company v. Antis*, 158 F. (2d) 948, 951-952 (C.C.A. 6, 1947); and cf. *Walling v. Goldblatt Brothers*, 152 F. (2d) 475, 477 (C.C.A. 7, 1945), cert. denied, 328 U. S. 854.

Even under the narrow doctrine of these Fair Labor Standards Act decisions, it is settled that the Chrysler parts and engines that have been purchased by appellee wholesalers "in response to orders" remain in commerce until delivered to the consumer. In addition, the goods purchased to fill anticipated demands of stable customers who create a steady market are within the same category. In view of the fact that this result was reached under statutes much narrower in their coverage than the Sherman Act, it necessarily follows that the business conducted by the corporate appellees, upon which this restraint was imposed, is interstate commerce within the meaning of the antitrust laws.

B. *Appellees' conspiracy to fix consumer prices of Chrysler parts affects interstate commerce within the meaning of the Sherman Act*

As we have pointed out above, it is not necessary that the restraint be in commerce itself for appellees' conspiracy to come within the provisions of the Act. Appellees are brought within the statute if their actions affect that commerce which is protected by the constitutional authority.

It has long been settled that purely local activities are subject to regulation, even though the practices concern intrastate commerce and "no part of the product is intended for interstate commerce or intermingled with the subjects thereof." *Wickard v. Filburn*, 317 U. S. 111, at 120. As was stated in a recent opinion of the Supreme Court, *United States v. Women's Sportswear Manufacturers Association*, 336 U. S. 460, at 464:

The trial court appears to have dismissed the case chiefly on the ground that the accused Association and its members were not themselves engaged in interstate commerce. This may or may not be the nature of their operation considered alone, but it does not matter. Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

In *United States v. Wrightwood Dairy Company*, 315 U. S. 110, marketing orders fixing minimum prices to producers of milk, pursuant to the Agricultural Marketing Agreement Act, were held applicable to a pro-

ducer of milk all of which was produced, processed, and sold within a state. The Court stated (pp. 119-121):

The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.

Competitive practices which are wholly intrastate may be reached by the Sherman Act because of their injurious effect on interstate commerce. *Northern Securities Co. v. United States*, 193 U. S. 197; *Swift & Co. v. United States*, 196 U. S. 375; *United States v. Patten*, 226 U. S. 525; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295; *Local 167 v. United States*, 291 U. S. 293; *Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 255. So too the marketing of a local product in competition with that of a like commodity moving interstate may so interfere with interstate commerce or its regulation as to afford a basis for Congressional regulation of the intrastate activity. It is the effect upon the interstate commerce or its regulation, regardless of the particular form which the competition may take, which is the test of federal power. Cf. *Shreveport Case*, *supra*; *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.*, *supra*; *National Labor Relations Board v. Jones & Laughlin Corp.*, 301 U. S. 1, 36-43; *United States v. Darby*, *supra*, 122.

And in *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219, a treble damage action involving price fixing by local purchasers of beets from the farmer, the Court stated (p. 234) “. . . given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the effect is sufficiently substantial and ad-

verse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall"

These principles have been applied by this Court many times. Two recent decisions which, we believe, are determinative of the case at bar, are *Food and Grocery Bureau of Southern California v. United States*, 139 F. (2d) 973 (C.C.A. 9, 1943) and its companion case, *California Retail Grocers & Merchants Association v. United States*, 139 F. (2d) 978, cert. denied, 322 U. S. 729. These cases concerned a conspiracy, through a trade association, to fix retail prices of food and groceries in California. This Court quoted with approval the statement of the Supreme Court in *Local No. 167 v. United States*, 291 U. S. 293, 297, that "the control of prices 'in the state of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce'" (139 F. (2d) 978) and stated that "agreements stabilizing such prices either at a maximum or a minimum or through a formula violate the Sherman Act." The purpose and effect of the conspiracy in the case at bar is identical with that in these food cases. The fact that in the food cases the attempt was made to enforce the price restrictions upon out-of-state vendors is of no significance. As we have pointed out above, the physical location of the conspirators does not determine whether the restraint is prohibited under the Sherman Act. The question is solely as to the effect of the restraint, and, in both the food cases and the instant case the effect of the restraint is to fix and control prices to consumers. In both situations such an illegal price-fixing arrangement has an immediate adverse effect upon the market for goods moving in interstate commerce. In addition there is the ever-present factor of competition between those parts which are not exclusively usable on Chrysler cars, and those of other manufacturers. Clearly, the deci-

sions of this Court in the food cases are completely dispositive of the issues now before the Court. In passing, we should like to add that the indictment in the *Food & Grocery Bureau* case was substantially identical with that now before the Court, and a motion to dismiss was overruled by the District Court for the Southern District of California (41 F. Supp. 884).

The scope of the power to regulate commerce under the Sherman Act is coextensive with that under the National Labor Relations Act (29 U.S.C. 151), since the latter statute, also, exercises the full scope of the commerce clause. It has long been settled that the jurisdiction of the National Labor Relations Board, under the commerce power, extends to businesses and conduct such as appellees'. In *N.L.R.B. v. Kudile*, 130 F. (2d) 615 (C.C.A. 3, 1942), the Court held that a dairy company which purchased a large part of its products outside of the state but sold all of them within the state is subject to the Federal statute, notwithstanding the argument that, since all of its sales were intrastate, the company was beyond the scope of Federal jurisdiction. Similarly, the Court of Appeals for the Fourth Circuit in 1942, in *N.L.R.B. v. Robert S. Green, Inc.*, 125 F. (2d) 485, ruled that a Maryland corporation engaged in the building supply business was within the jurisdiction of the Board because it purchased the majority of its supplies outside the state. The corporation sold less than 1% of its goods outside of Maryland, and the Court stated that it would not consider whether jurisdiction could be based on these sales, since it existed on the basis of the corporation's interstate purchases alone. "Whether the sales to points outside of Maryland are sufficient in amount to furnish a basis of jurisdiction for the Board's action we need not decide, since we think that such basis unquestionably exists with respect to shipments made to respondent from without the state."

In *N.L.R.B. v. Suburban Lumber Company*, 121 F. (2d) 829 (C.C.A. 3, 1941), the Court held that a retail lumber dealer which purchased \$150,000 in lumber from other states and made 1% of its sales outside the state, was engaged in a business affecting interstate commerce. The Court based its decision on the dealer's out-of-state purchases, and made the following interesting comments in comparing the scope of the Sherman Act (p. 832):

In this view, percentages and such mathematical formulae are manifestly irrelevant except possibly in one respect. Using the commonly accepted watercourse metaphor, a thimble affects a brook, a bucket affects a stream and a spillway affects a river . . .

. . . Certainly no average sized retailer could escape the operation of the Sherman Anti-Trust Act on the ground that the effect of its restraint upon interstate commerce was not substantial. If the Suburban combined with other retailers in the restraint of trade, there can be no question but that Suburban would be liable to prosecution under the Sherman Act. While it is true that the conspiracy or combination would be the element which would render the Suburban criminally or civilly liable, Federal jurisdiction would be conferred solely because Suburban's individual restraint substantially burdened interstate commerce . . .

The Court continued by quoting the following passages from comment and decision to illustrate the principle applied (121 F. (2d) 833):

For the same reasons, the act would seem to embrace a third type of business—companies which receive a large proportion of the materials needed for production or for distribution from other states, but which sell practically all of their goods to local or intrastate purchasers. * * * Certainly, labor difficulties occurring at this stage of commercial

intercourse may burden the free flow of commerce among the states just as effectively as those arising at its source. The Court itself took this position when it said "the fact that the means operated at one end before physical transportation commenced and at the other end after the physical transportation ended was immaterial." Mueller, *Businesses Subject To The National Labor Relations Act*, 35 Michigan Law Review 1286, 1294-1296.

And it has been held in one case: "There can be no difference in principle between the case in which manufacture precedes and that in which it follows interstate commerce. If the flow of commerce is obstructed by labor disputes, it can make no difference from which direction the obstruction is applied." *Newport News Shipbuilding & Dry Dock Co. v. N.L.R.B.*, 4 Cir., 101 F. (2d) 841, 843.

To revert to our watercourse metaphor, the thimble, the bucket and the spillway remove just as much water no matter at what part of the brook, stream or river they are applied.

Similarly, the Courts have upheld the Labor Board's jurisdiction over retail establishments, such as department stores, which purchase substantial amounts of goods out of the state. *N.L.R.B. v. J. L. Hudson Company*, 135 F. (2d) 380 (C.C.A. 6, 1943), cert. denied, 320 U. S. 740 (80% of merchandise purchased out-of-state, 1.6% of sales out-of-state); *J. L. Brandeis & Sons v. N.L.R.B.*, 142 F. (2d) 977 (C.C.A. 8, 1944), cert. denied, 323 U. S. 751, rehearing denied, 323 U. S. 815 (75% of purchases outside of state, .0024% of sales outside of state); *N.L.R.B. v. May Department Stores Company*, 146 F. (2d) 66 (C.C.A. 8, 1944), affirmed 326 U. S. 376, rehearing denied, 326 U. S. 811 (70% of purchases outside of state, 12% of sales outside of state). This Court, in 1944, likewise held that a wholesaler of variety store merchandise, 65% of whose purchases were made outside of the state, and approximately 3% of whose sales were made outside of the state, was subject to the juris-

diction of the Labor Board, *N.L.R.B. v. Ellis-Klatscher & Company*, 142 F. (2d) 356, and in *N.L.R.B. v. Van DeKamp's, etc. Bakers*, 152 F. (2d) 818 (1946), this Court held commerce to be affected in the case of a bakery purchasing 30% of its materials outside the state and selling all of its products within the state. These cases are based upon the principles established by the Supreme Court in *N.L.R.B. v. Fainblatt*, 306 U. S. 601, *N.L.R.B. v. Bradford Dyeing Association*, 310 U. S. 318, and similar cases. Without discussing in detail these decisions involving retail and wholesale merchandising businesses, it is clear that, under the principles expressed in the opinions, the determination by the Courts that commerce was affected is not dependent upon whether any interstate sales are made by these businesses, but rather is grounded upon the more basic principle that the nature and scope of the business, as demonstrated by extensive out-of-state purchases, is so intimately connected with commerce as to bring it within the Federal power.² Cf. *United States v. Moun-*

² The Supreme Court has rejected the use of the term "direct" or "indirect" as a rule-of-thumb in determining effect on commerce. As early as *Carter v. Carter Coal Co.*, 298 U.S. 238, Mr. Justice Cardozo, in his dissent, criticized the term—" . . . a great principle of constitutional law is not susceptible of comprehensive statement in an adjective." (298 U.S. 327). In *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453, the terminology was said merely to embody the distinction between "remote" and "close and substantial" a "criterion . . . necessarily one of degree" not susceptible of expression in "mathematical or rigid formulas" (303 U.S. 466-7). In *Wickard v. Filburn*, 317 U.S. 111, 122-23, Mr. Justice Jackson stated "In some cases sustaining the exercise of federal power over intrastate matters the term 'direct' was used for the purpose of stating, rather than of reaching, a result; in others it was treated as synonymous with 'substantial' or 'material'; and in others it was not used at all. Of late its use has been abandoned in cases dealing with questions of federal power under the Commerce Clause." This "deliberate departure from the direct-indirect formula . . . was a healthy reversion to first principles, to the Constitution itself." Stern: *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv. L. Rev. 645, 891.

tain States Lumber Dealers Association, 40 F. Supp. 460 (D. Colo., 1941).

In two cases reaching the Courts of Appeal, automobile dealers were held subject to the National Labor Relations Act. *N.L.R.B. v. Henry Levaux, Inc.*, 115 F. (2d) 105 (C.C.A. 1, 1940); *Williams Motor Company v. N.L.R.B.*, 128 F. (2d) 960 (C.C.A. 8, 1942). Both of these dealers made a substantial portion of their sales, as well as of their purchases, outside of the state, although the decisions did not turn on this point. In the *Williams* case, the Court said "it appears that the major part of petitioner's business was closely related to interstate commerce. The basis of its business was handling the Chrysler Corporation cars which came from Detroit." (128 F. (2d) 963). Following the principles so clearly laid down in the cases cited above, the National Labor Relations Board has consistently taken jurisdiction of business identical with those engaged in by appellees. See *Matter of M. L. Townsend*, 81 N.L.R.B. No. 122, 2 C.C.H. Labor Law Sv. ¶8656 (1949) (retail dealer in new automobiles, used automobiles, parts, and repair services, all of whose sales were made within the state and all of whose automobiles were purchased from wholesale distributors within the state). To the same effect are *Matter of Valley Truck & Tractor Company*, 80 N.L.R.B. 444, 2 C.C.H. Labor Law Sv. ¶8404 (1948); *Matter of Puritan Chevrolet, Inc.*, 76 N.L.R.B. 1243 (1948); *Matter of Liddon-White Truck Company*, 76 N.L.R.B. 1181 (1948). See also *Matter of Harry's Cadillac-Pontiac Company, Inc., et al.*, 81 N.L.R.B. 1 (1949), No. 34-RC-71 (not yet printed) (dealers in new automobiles, used automobiles, parts and accessories, all of whose sales were made within the state); and *Matter of Mid-Town Motors, et al.*, 80 N.L.R.B. 1679 (1948), No. 20-RC-141 (not yet printed) (involving eight retail dealers in new and used automobiles, parts,

and services, all of whom sold only within the state and some of whom made all purchases from wholesale automobile distributors within the state).

In the light of these decisions of the courts during the past fifteen years and of any realistic understanding of our national economy, the conclusion is inevitable that these appellees have conspired to impose a restraint which so affects interstate commerce as to fall within the federal power expressed in the Sherman Act. Appellees, dealers in automobile parts and engines manufactured and purchased outside of the state, an essential part of a great national industry, distributors of merchandise utilized throughout the country as the result of a far-flung and mutually dependent system of transportation and distribution, are surely within the reach of federal control under the commerce clause. For it is just such freedom from local impediments in our national economy that the commerce clause protects. Certainly the indictment alleges that such a restraint on commerce was created within the meaning of the statute, requiring, at the very least, a trial to determine whether these allegations will be sustained by the facts.

II

The Indictment Is Sufficient as a Pleading in Charging Clearly and Specifically a Conspiracy in Violation of the Sherman Act

The opinion of the District Court (*supra*, p. 6) does not disclose in what, if any, respect the indictment was found in fault as a matter of technical draftsmanship. The appellees have raised a number of objections. Since these appear in large part to be the product of the natural disinclination of an accused to concede any possible defense, we can discuss them only in the general terms in which they were raised.

The Federal Rules of Criminal Procedure require an indictment to be a "plain, concise, and definite written

statement of the essential facts constituting the offense charged.” Rule 7(c). Under this rule, as controlled by Constitutional requirements, it has been held many times that an indictment is sufficient if it so informs the accused of the nature of the charge against him that he may prepare his defense and, where appropriate, later plead former jeopardy. *United States v. Achtner*, 144 F. (2d) 49 (C. C. A. 2, 1944); *United States v. American Medical Assn.*, 110 F. (2d) 703 (App. D. C., 1940), cert. denied, 310 U. S. 644; *Wilson v. United States*, 158 F. (2d) 659 (C. C. A. 5, 1947), cert. denied, 330 U. S. 850; *U. S. v. Armour & Co.*, 137 F. (2d) 269 (C. C. A. 10, 1943).

It is clear that the indictment, which is set forth in full at p. 3 of the record, conforms with these basic precepts. A normal and ordinary reading of the indictment informs the appellees of the crime charged, and of how, when, and where they are alleged to have carried it out. Paragraph 12 charges the appellees with conspiring to fix prices on Chrysler parts and engines in restraint of interstate commerce and in violation of the Sherman Act. The conspiracy is the crime. No further act is necessary for liability. *Nash v. United States*, 229 U. S. 373, 378, and the term “conspiracy” is the proper charge, *United States v. Armour & Company*, 137 F. (2d) 269, 270 (C. C. A. 10, 1943).

There is nothing vague or unidentifiable about the conspiracy charged. Appellees are able readily to identify the terms of the conspiracy, and even the actions which are alleged to have been the product of their combination. Paragraph 13 specifies that the conspiracy consisted of continuing agreement and concert of action among the appellees to fix prices for the sale to consumers of Chrysler replacement parts and engines by the appellee wholesalers, as well as to compel and induce the dealers to whom they also sold to maintain

the identical fixed prices in consumer sales. It can hardly be contended that the appellees are so naive as not to be cognizant of what conspiracy the indictment charges, on the basis of these allegations alone. But, if there were any doubt, the succeeding paragraphs are incapable of misinterpretation. Paragraph 15 alleges that on or about November 12, 1946 the appellees agreed to a price increase on parts and engines in western Washington, ranging from 5 to 15% as specified, and that appellees notified the dealers to whom they sold of these increases, furnishing them with computation tables of the new price lists. Paragraph 16 alleges that on or about November 1947 the appellees organized the Wholesalers Association, and that thereafter this Association was utilized as an instrumentality in furthering the conspiracy; that periodic meetings were held at which price information was exchanged and agreements reached for uniform prices. Paragraph 17 asserts that on or about January 8, 1948 appellees agreed upon an additional increase of 10% in the price of Class B parts to consumers, and a reduction in the discount on engines to certain classes of consumers. Again, appellees notified the dealers to whom they sold of the price changes and furnished computation tables so that there would be no miscalculation. Paragraph 18 alleges another concerted price increase, on or about March 1, 1948, ranging from 5 to 10% in the price to consumers. Paragraph 19 alleges that appellees organized on or about March 19, 1948 the MoPar Club, in which all corporate appellees except Riegel participated, and which was thereafter used, through meetings and exchange of information, as an instrumentality to effectuate the price-fixing conspiracy. Paragraph 20 alleges an additional increase of 5% on the price of engines sold to consumers, by concerted action of appellees on July 19, 1948. Again, appellees notified the

dealers to whom they sold, and furnished uniform price lists.

Surely, the appellees cannot seriously contend that they are not informed of the charge against them. Appellees must be aware of their actions in connection with price-fixing of the products with which they dealt on November 12, 1946, January 8, 1948, March 1, 1948 and July 19, 1948. Reference to the uniform price lists which, it is alleged, they drew up and had distributed, should refresh recollection of those events. Participation in the formation of the Wholesalers Association and the MoPar Club, as well as the activities conducted through those organizations in exchanging price information and establishing fixed prices, are not actions susceptible of an ambiguous interpretation.

We, therefore, believe it amply clear that any businessman, charged with the crime of conspiring to restrain trade in violation of the Sherman Act as amplified by such a series of descriptive facts, has been informed fully of the crime with which he is charged. While there may or may not remain questions of law, there can be no doubt in the appellees' minds as to what actions are challenged.

The indictment thus complies fully with the basic requirement that the accused be informed of the nature of the charge in order that he may prepare his defense. In fact, the indictment goes into greater detail in this respect than required, for conspiracy cases under the Sherman Act may be alleged with less particularity than is required in an indictment for other types of criminal conspiracy, since it is not necessary to allege the commission of an overt act, and such conspiracies are frequently established by inference from a course of conduct. *Nash v. United States*, 229 U. S. 373, 378; *Eastern States Lumber Association v. United States*, 234 U. S. 600, 612; *Interstate Circuit v. United States*,

306 U. S. 208, 226. Indictments substantially in the words of the statute have been upheld frequently in cases involving crimes other than antitrust violations. *United States v. Achtner, supra*; *United States v. Krepper*, 159 F. (2d) 958 (C. C. A. 3, 1946), cert. denied, 330 U. S. 824; *United States v. Martinez*, 73 F. Supp. 403 (M. D. Pa., 1947).

Although names, dates, and places have been included in the indictment in specifying the actions of appellees taken in furtherance of the conspiracy, the indictment charges but one offense. It is in one count, and charges only one conspiracy—the conspiracy to fix consumer prices of these goods. The descriptive allegations assist the appellees to identify the crime, and cannot be separated from the crime from which they stem. “It hardly needs statement that the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole”, *United States v. Patten*, 226 U. S. 525, 544. It is not duplicitous to allege the various means used in committing the offense. *Silkworth v. United States*, 10 F. (2d) 711 (C.C.A. 2, 1926), cert. denied, 271 U. S. 664.

We see no basis for the argument that the indictment is vague and indefinite. To the contrary, it is as specific and definite as the circumstances of the alleged crime permit. This objection has been raised frequently to Sherman Act indictments, and consistently rejected by the courts. *United States v. Frankfort Distilleries*, 144 F. (2d) 824 (C.C.A. 10, 1944); *United States v. Tarpon Springs Sponge Exchange*, 142 F. (2d) 125 (C.C.A. 5, 1944); *United States v. Armour & Co.*, 137 F. (2d) 269 (C.C.A. 10, 1943); *United States v. American Medical Assn.*, 110 F. (2d) 703 (App. D. C., 1940), cert. denied, 310 U. S. 644; *United States v. New York Great A. & P. Tea Co.*, 137 F. (2d) 459 (C.C.A. 5, 1943), cert. denied, 320 U. S. 783. In the *A. & P.* case the

Court, speaking of an indictment less concise and specific than the present one, remarked that "no one can read the indictment without understanding what is charged" (p. 462). It rejected a contention that the indictment contained mere conclusions as a "stereotyped complaint against indictments" (p. 463). These remarks fit the present case exactly. "In a conspiracy case it is not necessary to set out in detail the evidence of the conspiracy. Nor is it necessary to describe the conspiracy with the same degree of particularity as in describing a substantive offense." *Mercer v. United States*, 61 F. (2d) 97, 99 (C.C.A. 3, 1932). ". . . An indictment for conspiracy may be as general and indefinite as the conspiracy sought to be proved . . ." *Blaine v. United States*, 29 F. (2d) 651, 653 (C.C.A. 5, 1928), cert. denied, 279 U. S. 845.

For reasons more fully set forth in Part I of our brief above, and which we will not reiterate, the indictment amply establishes the effect of the illegal conspiracy upon interstate commerce. Paragraph 6 describes the goods dealt in. Paragraph 8 describes the sales made by the corporate defendants to consumers and dealers, and paragraph 9 describes the sales of these goods by the dealers to consumers. Paragraph 10 establishes that the corporate defendants purchase this merchandise from Chrysler plants in other states for resale to customers within Washington. These purchases are made in anticipation of and in response to orders and demands from customers, and the corporate defendants and dealers within the state are alleged to serve as a conduit through which the merchandise moves in a regular, continuous, and uninterrupted flow to the consumers. Paragraph 11 describes the volume of business done by the appellees and asserts that their business transactions are an integral part of and incidental to the movement of these goods in interstate commerce from other states to the consumers in Washington.

If there are trifling ambiguities in the indictment, a circumstance which we deny, the fact is neither important nor relevant. It is the precise function of the bill of particulars to reach any such ambiguities or minor uncertainties. And it is within the sound discretion of the court to grant or refuse such a motion. *Wong Tai v. United States*, 273 U. S. 77; *Glasser v. United States*, 315 U. S. 60; *United States v. Tarpon Springs Sponge Exchange*, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the District Court was in error in its decision, and that the order dismissing the indictment should be reversed.

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IN THE UNITED STATES
Court of Appeals
FOR THE NINTH CIRCUIT

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Appellant,

v.

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TIVE SERVICE, INC., WINTHROP MOTOR COMPANY,
RIEGEL BROTHERS, INC., W. G. POWELL, JOHN MUNSTER,
STANLEY SAYRES, RALPH W. HANSON, FRANK L. HAW-
KINS, CARL J. BRUSH, GEORGE W. MILLER, STANLEY
PETERSON, DEE R. RIEGEL, and T. H. NAISMITH,

Appellees.

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HONORABLE SAM M. DRIVER, Judge

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IN THE UNITED STATES
Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

CHRYSLER CORPORATION PARTS WHOLESALERS NORTH-
WEST REGION, MoPAR CLUB, S. L. SAVIDGE, INC., AMER-
ICAN AUTOMOBILE COMPANY, COMMERCIAL AUTOMO-
TIVE SERVICE, INC., WINTHROP MOTOR COMPANY,
RIEGEL BROTHERS, INC., W. G. POWELL, JOHN MUNSTER,
STANLEY SAYRES, RALPH W. HANSON, FRANK L. HAW-
KINS, CARL J. BRUSH, GEORGE W. MILLER, STANLEY
PETERSON, DEE R. RIEGEL, and T. H. NAISMITH,

Appellees.

BRIEF OF APPELLEES

JURISDICTIONAL STATEMENT

Appellees concur in the statement of the appellant that the indictment considered by the court below purports to charge a violation of Section 1 of the Sherman Act (15 U.S.C.A. § 1); that jurisdiction of the District Court was based upon 18 U.S.C.A. § 3231 and that this Court has jurisdiction of this appeal in accordance with the provisions of 18 U.S.C.A. § 3731.

STATUTE INVOLVED

Appellees concur in the statement that Section 1 of the Sherman Act (15 U.S.C.A. § 1) is involved in this appeal.

STATEMENT OF THE CASE

The indictment which was dismissed by the court below purports to charge two unincorporated associations, five corporations and ten individuals with violating Section 1 of the Sherman Act, it being alleged that the unincorporated

associations are composed of and the individuals are officers of the five Washington corporations which are *wholesalers* authorized to sell Chrysler replacement parts and engines at wholesale and at retail (R. 3-5). Neither the Chrysler Corporation nor any of its officers, agents or employees nor any one else outside the State of Washington are parties to the conspiracy alleged and the only relationship of Chrysler Corporation to any of the defendants or their activities is that of vendor, it being specifically alleged that the defendants are not "agents acting for Chrysler in the distribution of replacement parts and engines." (R. 7.)

It is alleged that Chrysler replacement parts and engines are manufactured outside the State of Washington and that the Chrysler Corporation "*sells* Chrysler replacement parts and engines to * * * 'authorized Chrysler dealers,' to whom it has granted a franchise to sell said automobiles and trucks and to a limited number of * * * persons and concerns, hereinafter referred to as 'authorized Chrysler wholesalers' who because of their geographical location, size and facilities for wholesale distribution of parts and engines, are granted franchises to act as wholesalers as well as retailers." (R. 6-7). The corporate defendants are stated to be the authorized Chrysler wholesalers in the state of Washington who sell to various classes of customers and it is stated that they sell more than 90% of the Chrysler replacement parts and engines used in the state of Washington (R. 7-8).

It is alleged that the defendants by conspiracy fixed the prices and discounts at which Chrysler replacement parts and engines were to be sold by the corporate defendants within the state of Washington (R. 9-15). All sales by the defendant corporations are stated to be within the state of Washington and it is nowhere alleged that the defendants

have made sales outside the state of Washington (R. 8, 9, 11, 12, 13 and 14).

The purpose, intent and necessary effect of the alleged conspiracy is stated to be (R. 14):

“(a) To eliminate all price competition among defendants and the authorized Chrysler dealers to whom they sell, in the sale of Chrysler replacement parts and engines shipped in interstate commerce into the state of Washington and sold and distributed therein, and to deny the consuming public in the state of Washington the benefits of such competition.

“(b) To raise, fix and maintain the prices at which Chrysler replacement parts and engines shipped into the state of Washington in interstate commerce are sold in the state of Washington, * * *”

It is alleged in paragraphs 8 and 9 of the indictment (R. 7-8):

“8. Authorized Chrysler wholesalers are not mere agents acting for Chrysler in the distribution of replacement parts and engines. By the terms of their franchise contracts with Chrysler, they are independent entrepreneurs engaged in the business of purchasing said parts and engines from Chrysler and reselling them as their own property. Said authorized Chrysler wholesalers sell said parts and engines to five classes of customers:

“(a) Authorized Chrysler dealers;

“(b) Owners of independent garages, repair shops, body rebuild shops and service stations who sell or install replacement parts or engines;

“(c) Fleet customers, such as cab companies, truck lines and other concerns using a number of vehicles in connection with their business;

“(d) Over-the-counter customers, not falling within any of the three previous categories, who purchase replacement parts or engines at retail; and

“(e) Repair department customers who have replacement parts or engines installed in their vehicles in the course of repairs made by the service departments of corporate defendants.

“9. Authorized Chrysler dealers are likewise independent entrepreneurs engaged in the business of purchasing and reselling Chrysler replacement parts and engines. They purchase substantially all of their requirements of said parts and engines from authorized Chrysler wholesalers, and resell said engines and parts to the classes of customers described in subparagraphs 8(b), (c), (d), and (e) above, in competition with authorized Chrysler wholesalers doing business in the same area.”

The following passages from paragraphs 10, 11 and 21 of the indictment (R. 8, 9 and 14-15) are the sole and only statements in the indictment by which it is attempted to relate the alleged conspiracy to interstate commerce and by which the appellant seeks to invoke the applicability of Section 1 of the Sherman Act:

“10. * * * in anticipation of, and in response to, orders and demands from customers in the state of Washington of the classes described in paragraph 8 hereof, the corporate defendants regularly order, purchase and procure the shipment of Chrysler replacement parts and engines from the Chrysler plants located in the states listed in paragraph 6 hereof, and resell said parts and engines to said customers in the state of Washington. Said corporate defendants, and authorized Chrysler dealers in the state of Washington to whom they sell, serve as a conduit through which said Chrysler replacement parts and engines move in a regular, continuous

and uninterrupted flow to the ultimate users of said parts and engines in the state of Washington.

* * *

"11. * * * The purchase and resale of Chrysler replacement parts and engines by the corporate defendants as the authorized Chrysler wholesalers for the state of Washington, and by the authorized Chrysler dealers to whom they sell, is an integral part of and incidental to the uninterrupted movement of said substantial volume of Chrysler replacement parts and engines in interstate commerce from the Chrysler plants located in the states listed in paragraph 6 hereof, to the ultimate users of said replacement parts and engines in the state of Washington.

* * *

"21. The purpose, intent and necessary effect of the aforesaid combination and conspiracy has been and is:

* * *

"(c) To directly, substantially, and unreasonably burden and restrain the flow in interstate trade and commerce of Chrysler replacement parts and engines from the states of Michigan, Georgia, Kansas, Delaware and California to the state of Washington, by means of the aforesaid elimination of price competition, and the aforesaid enhancement, fixing and maintenance of prices."

Upon motions of defendants that the indictment did not allege facts constituting an offense under Section 1 of the Sherman Act and did not allege facts sufficient to establish that the defendants had entered into a conspiracy in restraint of trade or commerce among the several states (R. 17) the Court below ordered the indictment dismissed (R. 24) and certified that this judgment was based in part upon the insufficiency of the indictment as a pleading (R. 26). The

appellant has appealed from this judgment dismissing the indictment (R. 27).

QUESTION PRESENTED

It is the position of the appellees that a single question is involved in this appeal—do the allegations of the indictment above set forth allege a conspiracy which is “in restraint of trade or commerce among the several states” within the scope of Section 1 of the Sherman Act? In short, is a restraint of interstate commerce alleged?

POSITION OF THE GOVERNMENT

The position of the government as set forth in the indictment here under consideration stands upon the bald proposition that an alleged agreement in restraint of trade, i.e., a price fixing agreement, among sellers of products whose entire sales are made wholly within a single state is, *without more*, a violation of the Sherman Act solely and simply because a portion of the products sold by these sellers was at some undetermined time in advance of the sale purchased by the sellers from outside the state.

The heart of the appellant’s position is stated in its brief as follows (Brief for Appellant, p. 15):

“Thus, the question here presented is, at bottom, not merely the construction of a statute but whether, acting to the extent of its constitutional power, the Federal Government can reach a conspiracy to fix prices to consumers of goods which are produced outside of the state and shipped to the conspirators in the state.”

Appellees submit that the indictment herein stands without the aid of judicial precedent and if it is to be sustained the proposition must be accepted that the Sherman Act extends to intrastate price fixing conspiracies among local in-

dependent entrepreneurs where any portion of their purchases for resale comes from outside the state—i.e., that the Sherman Act applies to a price fixing conspiracy involving any local retailer or wholesaler in America without the establishment of any further relation to interstate commerce than that such retailer or wholesaler purchased goods from outside his state for resale therein. This we believe for the reasons hereinafter set forth is not the law.

UNDISPUTED PROPOSITIONS

In order that the issue for decision may be more sharply focused we believe that it may be of assistance to indicate those propositions of law adverted to by appellant with reference to which the appellees are not in disagreement.

(1) A conspiracy to fix prices is an unreasonable restraint of trade *per se*. *United States v. Trenton Potteries Co.*, 273 U. S. 392, 71 L. ed. 700; *United States v. Socony-Vacuum Co.*, 310 U. S. 150, 84 L. ed. 1129. (See Brief for Appellant, p. 13).

Appellees agree that the conspiracy alleged is *of the character* condemned by the Sherman Act if it be “in restraint of trade or commerce among the several States.” 15 U.S.C.A. § 1.

(2) The scope of the Sherman Act is that of the commerce clause itself. *United States v. Frankfort Distilleries*, 324 U. S. 293, 298, 89 L. ed. 951, 956; *United States v. Southeastern Underwriters Association*, 322 U. S. 533, 558, 559, 88 L. ed. 1440, 1460. (See Brief for Appellant, p. 15).

It is the belief of the appellees and of the court below that the indictment here in question does not allege a set of facts subject to the exercise of the federal commerce power but there is alleged solely and simply a factual situation

which the decisions of the United States Supreme Court in determining the balance within our federal system have placed within the exclusive control of the several states. (See *infra*, pp 45-47).

Appellees contend that this indictment does not set forth *facts* from which this Court can find that a violation of the Sherman Act has been alleged.

(3) The Sherman Act is broad enough to include both restraints "in" interstate commerce and restraints "affecting" interstate commerce. (Brief for Appellant, p. 16).

ARGUMENT

Summary of Appellees Argument

The indictment involved in this appeal does not allege facts establishing a restraint "in" interstate commerce. Intra-state sales made by local wholesalers or retailers are not "in" interstate commerce, such commerce having ended upon the delivery to the local wholesaler of goods which he may have purchased outside the state.

Nor does the indictment allege any facts showing that the restraint alleged had any substantial effect upon interstate commerce. The indictment does not set forth any facts establishing that the restraint alleged was directed against or involved in any manner persons or activities outside the State of Washington and allegations of mere conclusions are insufficient to establish any such effect. Furthermore sound policy does not justify the extension of the Sherman Act sought by this indictment.

I. The Indictment Does Not Allege a Restraint "In" Interstate Commerce.

Whether or not the concepts of restraints "in" or "af-

fecting" interstate commerce have any functional validity we need not pause to consider (compare *Wickard v. Filburn*, 317 U. S. 111, 120, 87 L. ed. 122, 132). They do serve, however, as a convenient aid in analyzing the decisions of the United States Supreme Court as to the application of the Sherman Act to given factual situations and find expression in its opinions.

The traditional inquiry in determining whether or not given activities are "in" interstate commerce is the inquiry as to whether or not the goods involved have "come to rest" within the state prior to the occurrence of the activity in question. See *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 87 L. ed. 460; *Higgins v. Carr Brothers Co.*, 317 U. S. 572, 87 L. ed. 468; *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed. 1570; *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257, 72 L. ed. 270. And this is equally true whether the object of the inquiry be to determine whether or not there is interstate commerce involved for purposes of the Sherman Anti-Trust Act, see *Brosious v. Pepsi-Cola Co.*, 155 F. (2d) 99 (C.C.A. 3, 1946); *Ewing-Von Allmen Dairy Co. v. C. & C. Ice Cream Co.*, 109 F. (2d) 898 (C.C.A. 6, 1940), cert. denied 312 U. S. 689, 85 L. ed. 1126; *United States v. San Francisco Electrical Contractors*, 57 F. Supp. 57 (N. D. Calif. 1944); *C. S. Smith Metropolitan Market v. Food & Grocery Bureau of Southern California*, 33 F. Supp. 539 (S. D. Calif. 1939); the Clayton Act, see *Lipson v. Socony Vacuum Corp.*, 87 F. (2d) 265 (C.C.A. 1, 1937); the Food and Drug Act, see *United States v. Phelps Dodge Mercantile Co.*, 157 F. (2d) 453 (C.C.A. 9, 1946), cert. denied 330 U. S. 818, 91 L. ed. 1270; the Lanham Trade Mark Act, see *C. B. Shane Corp. v. Peter Pan Style Shop*, 84 F. Supp. 86 (N. D. Ill. 1949); the Motor Carrier Act, see *Safety of Operations of Private Property Carriers*, *Ex Parte* 3, 23 Motor Carrier Cases 1, 39; the

Fair Labor Standards Act, see *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 87 L. ed. 460; *Higgins v. Carr Brothers Co.*, 317 U. S. 572, 87 L. ed. 468; *Jax Beer Co. v. Redfern*, 124 F. (2d) 172 (C.C.A. 5, 1941); or for any other assertion of the federal commerce power involving the impact of that power upon activities "in" interstate commerce or "in the stream" of interstate commerce.

And while "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business," (*Swift & Co. v. United States*, 196 U. S. 375, 398, 49 L. ed. 518, 525) the decided cases unequivocally establish that *without additional facts being shown* the sales by a wholesaler within a given state of merchandise purchased by the wholesaler from outside the state are not "sufficient to establish that practical continuity in transit necessary to keep a movement of goods 'in commerce'." *Higgins v. Carr Brothers Co.*, 317 U. S. 572, 87 L. ed. 468. To the same effect see *Jax Beer Co. v. Redfern*, 124 F. (2d) 172 (C.C.A. 5, 1941) (Fair Labor Standards Act); *Jewell Tea Co. v. Williams*, 118 F. (2d) 202 (C.C.A. 10, 1941) (Fair Labor Standards Act); *Kantar v. Garchell*, 150 F. (2d) 47 (C.C.A. 8, 1945) (Fair Labor Standards Act); *Brosious v. Pepsi-Cola Co.*, 155 F. (2d) 99 (C.C.A. 3, 1946) (Sherman Act); *Ewing-Von Allmen Dairy Co., Inc., v. C. & C. Ice Cream Co.*, 109 F. (2d) 898 (C.C.A. 6, 1940) (Sherman Act); *United States v. San Francisco Electrical Contractors*, 57 F. Supp. 57 (N.D. Calif. 1944) (Sherman Act); *C. S. Smith Metropolitan Market v. Food & Grocery Bureau of Southern California*, 33 F. Supp. 539 (S.D. Calif. 1949) (Sherman Act).

The government in its brief before the court below contended that interstate commerce "begins with the manufacture of replacement parts and engines by Chrysler Corporation in plants outside the state of Washington and does

not end until these parts are purchased by the ultimate consumer for installation in his car or truck. At all points along their course from manufacturer to consumer the parts and engines are intended for but one end—installation in Chrysler-built vehicles” (which contentions we submit could be made with equal plausibility regarding any consumer product manufactured in America and distributed outside its state of manufacture whether it be shoes, men’s suits or chewing gum). Likewise, has the appellant urged as it did below that

“Any attempt to separate the sale of parts and engines at wholesale or retail from the entire chain of commerce from Chrysler Corporation plants in other states to retail outlets and to consumers in the State of Washington would be patently artificial and unrealistic.” (Brief for Appellant, p. 19)

The plain import of these statements is that counsel for appellant either wittingly or unwittingly is asking this Court to abrogate the distinction between interstate and intrastate commerce. These contentions of the government might be paraphrased in the language of the shoe industry or any one of a multitude of food or clothing or other items that such interstate commerce “begins with the manufacture of shoes in plants outside the State of Washington and does not end until these shoes are purchased by the ultimate consumer to wear on his feet or for those of his family. At all points along their course from manufacturer to consumer the shoes are intended for but one end—being worn on the feet of the ultimate purchaser.” It could also as plausibly be said that “any attempt to separate the sale of shoes at wholesale or retail from the entire chain of commerce from the shoe manufacturer’s plants in other states to retail outlets and to consumers in the State of Washington would be patently artificial and unrealistic.”

The Supreme Court has not seen fit to adopt any such concept of constitutional doctrine that would destroy the very roots of our constitutional federalism and we note that the appellant, although spelling out more specifically such a theory of interstate commerce in its brief before the court below is content merely that such a theory be inferred from its brief on this appeal.

As indicated above, the decided cases unequivocally establish that *without additional facts being shown* sales by a wholesaler of goods purchased outside the state are not in commerce. The additional facts necessary to "establish that practical continuity in transit necessary to keep a movement of goods 'in commerce' " are enunciated in *Walling v. Jacksonville Paper Co.*, infra pp. 13-19, and we submit that this indictment cannot be sustained as charging a restraint "in" interstate commerce unless its allegations of fact can be found to fall within the rule of the *Jacksonville Paper Co.* decision—a finding which the court below refused to make.

A. The Jacksonville Case.

Walling v. Jacksonville Paper Co., 317 U. S. 564, 87 L. ed. 460, has rightfully become the leading and controlling case in determining whether or not the activities of wholesalers can be said to be "in" interstate commerce since the Fair Labor Standards Act could be applied only insofar as the activities of the respondent wholesaler's employees were "in" commerce. See also *Higgins v. Carr Brothers Co.*, 317 U. S. 572, 574, 87 L. ed. 468, 471. The controlling facts were outlined by Justice Douglas as follows (317 U. S. at 565-566, 87 L. ed. at 465):

"* * * The sole issue here is whether the Act applies to employees at the seven other branch houses which, though constantly receiving merchandise on interstate shipments and distributing it to their customers, do not ship or deliver any of it across state lines.

“Some of this merchandise is shipped direct from the mills to respondent’s customers. Some of it is purchased on special orders from customers, consigned to the branches, taken from the steamship or railroad terminal to the branches for checking, and then taken to the customer’s place of business. The bulk of the merchandise, however, passes through the branch warehouses before delivery to customers. There is evidence that the customers constitute a fairly stable group and that their orders are recurrent as to the kind and amount of merchandise. Some of the items carried in stock are ordered only in anticipation of the needs of a particular customer as determined by a contract or understanding with respondent. Frequently orders for stock items whose supply is exhausted are received. Respondent orders the merchandise and delivers it to the customer as soon as possible. Apparently many of these orders are treated as deliveries from stock in trade. Not all items listed in respondent’s catalogue are carried in stock but are stocked at the mill. Orders for these are filled by respondent from the manufacturer or supplier. There is also some evidence to the general effect that the branch manager before placing his orders for stock items has a fair idea when and to whom the merchandise will be sold and is able to estimate with considerable precision the immediate needs of his customers even where they do not have contracts calling for future deliveries.”

Upon the general rule that intrastate sales by wholesalers are not “in” interstate commerce, the Court engrafted two exceptions. First, it was held that a “temporary pause in transit” at the respondent’s warehouse did not necessarily terminate the interstate journey of the goods in question, the Court stating (317 U. S. at 567, 87 L. ed. at 465-466):

“The Administrator contends in the first place that under the decision below any pause at the warehouse is sufficient to deprive the remainder of the journey of its interstate status. In that connection it is pointed out

that prior to this litigation respondent's trucks would pick up at the terminals of the interstate carriers goods destined to specific customers, return to the warehouse for checking and proceed immediately to the customer's place of business without unloading. That practice was changed. The goods were unloaded from the trucks, brought into the warehouse, checked, reloaded, and sent on to the customer during the same day or as early as convenient. The opinion of the Circuit Court of Appeals is susceptible of the interpretation that such a pause at the warehouses is sufficient to make the Act inapplicable to the subsequent movement of the goods to their intended destination. We believe, however, that the adoption of that view would result in too narrow a construction of the Act. It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce."

Secondly, it was held that intrastate deliveries of goods by the respondent "to meet the needs of specified customers" where the goods "are ordered pursuant to a pre-existing contract or understanding with the customer" are "in" interstate commerce as well as "special orders" which are shipped directly from the out of state manufacturer to customers of the wholesaler. The Court stated (317 U. S. at 568, 87 L. ed. 466):

"* * * the Administrator contends that the decision below excludes from the category of goods 'in commerce' certain types of transactions which are substantially of the same character as the prior orders which were included. Thus it is shown that there is a variety of items printed at the mill with the name of the customer. It is also established that there are deliveries of certain goods which are obtained from the manufacturer or supplier to meet the needs of specified customers. Among the latter are certain types of newsprint, paper, ice cream cups, and cottage cheese containers. The record reveals,

however, that the goods in both of these two categories are ordered pursuant to a pre-existing contract or understanding with the customer. It is not clear whether the decision of the Circuit Court of Appeals includes these two types of transactions in the group of prior orders which it held were covered by the Act. We think they must be included. Certainly they cannot be distinguished from the special orders which respondent receives from its customers. Here also, a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. * * *

Further than this the unanimous opinion of the Court refused to go in the following language (317 U. S. at 569-570, 87 L. ed. at 467):

"Finally, the Administrator contends that most of the customers form a fairly stable group, that their orders are recurrent as to the kind and amount of merchandise, and that the manager can estimate with considerable precision the needs of his trade. It is therefore urged that the business with these customers is 'in commerce' within the meaning of the Act. Some of the instances to which we are referred are situations which we have discussed in connection with goods delivered pursuant to a prior order, contract, or understanding. For the reasons stated they must be included in the group of transactions held to be 'in commerce.' As to the balance, we do not think the Administrator has sustained the burden which is on a petitioner of establishing error in a judgment which we are asked to set aside. We do not mean to imply that a wholesaler's course of business based on anticipation of needs of specific customers, rather than on prior orders or contracts, might not at times be sufficient to establish that practical continuity in transit

necessary to keep a movement of goods 'in commerce' within the meaning of the Act. It was said in *Swift & Co. v. United States*, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 S. Ct. 276, that 'commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business.' While that observation was made apropos of the constitutional scope of the commerce power, it is equally apt as a starting point for inquiry whether a particular business is 'in commerce' within the meaning of this Act. We do not believe, however, that on this phase of the case such a course of business is revealed by this record. *The evidence said to support it is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition.*" (Italics supplied).

The appellant rests its contention as to the applicability of the *Jacksonville Paper Co.* case upon the allegations of fact contained in the following single sentence contained in paragraph 10 of the indictment where it is said (R. 8):

"In anticipation of, and in response to, orders and demands from customers in the State of Washington of the classes described in paragraph 8 hereof, the corporate defendants regularly order, purchase and procure the shipment of Chrysler replacement parts and engines from the Chrysler plants located in the states listed in paragraph 6 hereof, and resell said parts and engines to said customers in the state of Washington."

The following conclusions are also alleged in paragraphs 10 and 11 of the indictment (R. 8, 9) with reference to which conclusions we refer the Court to that portion of our brief hereinafter following at pp. 33-36.

"* * * Said corporate defendants, and authorized Chrysler dealers in the state of Washington to whom

they sell, serve as a conduit through which said Chrysler replacement parts and engines move in a regular, continuous and uninterrupted flow to the ultimate users of said parts and engines in the state of Washington.

* * *

“* * * The purchase and resale of Chrysler replacement parts and engines by the corporate defendants as the authorized Chrysler wholesalers for the state of Washington, and by the authorized Chrysler dealers to whom they sell, is an integral part of and incidental to the uninterrupted movement of said substantial volume of Chrysler replacement parts and engines in interstate commerce from the Chrysler plants located in the states listed in paragraph 6 hereof, to the ultimate users of said replacement parts and engines in the state of Washington.”

The appellant in its brief before this Court has no less than a half dozen times charged the appellees with ignoring “the realities of our integrated national economy.” (Brief for Appellant, pp. 9-10, 11, 14, 17, 19 and 31). With all due respect we suggest that the appellant in its brief has ignored the realities of the allegations which are contained in the indictment here under consideration. We believe it is obvious that the appellant has seen the difficulties of its position under the rules announced in the *Jacksonville Paper Co.* case and rather than rely upon the allegations of the indictment itself, appellant has predicated its argument upon what appellant might wish the indictment alleged. Appellant states in its Summary of the Indictment (Brief for Appellant, pp. 3-4):

“* * * It is alleged in paragraph 10 that the corporate defendants regularly order, purchase and procure the shipment of Chrysler replacement parts and engines from Chrysler plants in other states for the purpose of filling two distinct needs.

“First, drawing upon past sales experience, these companies anticipate probable sales in the immediate future and have parts and engines regularly coming in from out-of-state plants so as to meet dealer and consumer needs as they arise.

“Second, in response to orders already on hand from dealers and consumers, defendant corporations procure shipments from Chrysler plants outside the state of parts or engines, which are intended exclusively for specific dealers or consumers, and are delivered to them upon arrival at defendants’ places of business.”

See also Brief for Appellants, p. 16. We submit that a reading of the indictment does not disclose what appellant says it does (Supra, p. 4, R. 8, 9).

It was urged in the *Jacksonville Paper Co.* case that sales by the wholesaler were “in” interstate commerce because he could estimate with considerable precision and could anticipate the needs of his customers. Justice Douglas described the evidence there said to support such contention in language which could hardly be a more accurate characterization of the allegations of paragraph 10 of this indictment when he wrote that it “is of a wholly general character and lacks that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition.” (317 U. S. at 570, 87 L. ed. at 467). And this observation it may be pointed out obtained where the inquiry was to determine whether the sales by the wholesaler were “in” commerce under the provisions of a statute whose objectives like that of the Sherman Act for purposes of this inquiry was “to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce” (317 U. S. at 567, 87 L. ed. at 465-466). See also, supra, page 7, and *United States v. Frankfort Distilleries*, 324 U. S. 293, 298, 89 L. ed. 951, 956; *United*

States v. Southeastern Underwriters Association, 322 U. S. 533, 558, 559, 88 L. ed. 1440, 1460.

We believe that the allegations of fact in the instant indictment are clearly insufficient to support the contention that the restraint alleged was "in" interstate commerce. As stated by the trial court (R. 23) the indictment

"* * * does no more than simply allege that these defendants in the State of Washington as wholesalers were ordering, as an ordinary wholesaler does, in anticipation of orders and contracts, and in response to orders and contracts, and that they weren't ordering as agents of Chrysler, but they were buying and selling again, that that is a completed transaction; they bought the goods, and it was shipped in there; they would pass then, I think, from interstate to intrastate commerce, and the succeeding sale would be intrastate commerce."

B. Cases Relied Upon by Appellant.

Reserving for subsequent discussion the question as to whether or not the restraint alleged in this indictment "affects" interstate commerce (infra pp.24-45) we believe that a cursory reading of the cases relied upon by appellant will disclose that they in no wise hold or imply that the restraint here charged is "in" interstate commerce.

In *Local 167 v. United States*, 291 U. S. 293, 78 L. ed. 804, the poultry wholesalers took delivery of about half the poultry destined for the New York market at terminals in New Jersey and the balance at terminals in New York City, the loading, unloading and trucking at and from all terminals being handled by members of the defendant union. Recalcitrant wholesalers were "prevented from obtaining poultry by purchase from receivers [commission men], this being accomplished through the aid of the unions, whose members would refuse to load or drive his trucks * * * [and] * * * were

prevented from obtaining poultry at the railroad terminals or the West Washington Market" (*Greater New York Live Poultry C. of C. v. United States*, 47 F. (2d) 156 at 158) (C.C.A. 2, 1941)). In this companion case on the criminal side of the court where the facts were established, the Circuit Court of Appeals observed that the object of the conspiracy "was the prevention of recalcitrant marketmen from obtaining poultry from receivers whether within or without the state of New York, and that the activity of the Truckmen's Union in preventing purchases by such recalcitrants was not merely coincidental but was part of the conspiracy" (47 F. (2d) at 159). Prior litigation indicates that in this industry where the purchases were made by wholesalers at the New Jersey terminals "the poultry reaches Washington Market after a pause at Hoboken only sufficient to put it into crates. It is, moreover, in proof that the sales take place on the same day as the poultry arrives in New York." (*Live Poultry Dealers' Protective Association v. United States*, 4 F. (2d) 840, 842 (C.C.A. 2, 1924)).

It is, we believe, also pointedly significant that the Court in *Local 167 v. United States*, *supra*, specifically did "not decide when interstate commerce ends and that which is intrastate begins" but held (291 U. S. at 297, 78 L. ed. at 808-809):

"* * * The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operate substantially and directly to restrain and burden the untrammelled shipment and movement of the poultry while unquestionably it is in interstate commerce."

And of this holding Chief Justice Hughes wrote in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 525-526, 84 L. ed. 1311, 1340:

“Thus it was the ‘untrammelled shipment and movement’ which, when found to be directly and intentionally restrained was held to constitute violation of the Sherman Act.”

To the same effect see *Schechter v. United States*, 295 U. S. 495, 544-545, 79 L. ed. 1570, 1588.

Appellant also relies upon *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, where the complaint alleged that the various “defendants are engaged in the business of buying live stock at the stock yards in Chicago, Omaha, St. Joseph, Kansas City, East St. Louis and St. Paul and slaughtering such live stock at their respective plants in places named in different states * * *. *The defendants are also engaged in the business of selling such fresh meats, at the several places where they are so prepared to dealers and consumers in divers states and territories * * * and shipping the same meats*” (196 U. S. at 391, 49 L. ed. at 522). The defendants were charged with fixing the prices which they paid for livestock shipped into these various markets and the prices at which they sold the fresh meats. The Court held that commerce among the states “is an object of attack” and considered that the entire activities of defendants constituted “a current of commerce among the states,” observing that “the cattle in the stock yard are not at rest even to the extent that was held sufficient to warrant taxation” (196 U. S. at 397, 399, 49 L. ed. at 524, 525).

With reference to *United States v. General Motors Corp.*, 121 F. (2d) 376 (C.C.A. 7, 1941), appellant has itself characterized the case as one involving “another conspiracy affecting interstate commerce” (Brief for Appellant, p. 19), and we prefer to discuss the case hereafter in the portion of our brief devoted to that issue.

The final case relied upon by appellant to establish that the indictment here in question alleges a restraint "in" interstate commerce is *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52, 71 L. ed. 534. Here the Court not only found that the price lists of the association were used by the member dealers in making sales to customers outside their respective states but, with respect to the "mill shipments" which the appellant here has referred to, the Court pointed out that there was no sale by a wholesaler to a customer from his stock of merchandise—rather did the customer take actual physical delivery of the goods before they had ever come even temporarily to rest from their interstate movement. The facts related to these transactions are outlined by the Court as follows (273 U. S. at 60, 71 L. ed. at 537):

"Among the prices fixed by each local association for sales by its members within the state where they are located are prices on what are called 'mill shipments.' These are sales or orders not requiring immediate delivery and capable of being filled by shipment from the place of manufacture. They include less than carload lots and also carload lots. The former are combined with other paper to make a carload which is shipped to the wholesaler as a single consignment. At destination the delivery is taken by the wholesaler and the portion intended for the purchaser is turned over to him. The carload shipments are made on directions specifying as the point of destination the place where delivery is to be made from the wholesaler to the purchaser. In some cases the wholesaler, in other cases the purchaser, is named as consignee. When so named the wholesaler either takes delivery and turns over the shipment to the purchaser or endorses the bill of lading to the purchaser who then receives the paper directly from the carrier. Where named as consignee, the purchaser takes delivery. In all cases the wholesaler orders the paper from the mill and pays for it. There is no contractual relation

between the manufacturer and the purchaser from the wholesaler. These shipments are made from mills within and also from those without the state covered by the agreement fixing prices."

The Court had little difficulty in determining that these sales were "in" interstate commerce stating with reference to these "mill shipments" from one state to another (273 U. S. at 63-64, 71 L. ed. at 538-539):

"* * * For the consummation of a transaction involving such a shipment, two contracts are made. The first is for sale and delivery by wholesaler to retailer in the same state. The seller is free to have delivery made from any source within or without the state. The price charged is that fixed by the local association. The other contract is between the wholesaler and the manufacturer in different states. There is no contractual relation between the manufacturer and retailer. By the shipment of the paper from a mill outside the state to or for the retailer, the wholesaler's part of the first contract is performed. The question is whether the sale by the wholesaler to the retailer in the same state is a part of interstate commerce where, subsequently at the instance of the seller and to perform his part of the contract, the paper is shipped from a mill in another state to or for the retailer. * * * The absence of contractual relation between the manufacturer and retailer does not matter. The sale by the wholesaler to the retailer is the initial step in the business completed by the interstate transportation and delivery of the paper. Presumably the seller has then determined whether his source of supply is a mill within or one without the state. *If the contract of sale provided for shipment to the purchaser from a mill outside the state, then undoubtedly it would be an essential part of commerce among the states. Clearly the absence of such a provision does not affect the substance of the matter when in fact such a shipment was contemplated and made.* The election of the seller to have the shipment made from a mill outside the state

makes the transaction one in commerce among the states. *And on these facts the sale by jobber to retailer is a part of that commerce.*" (Italics supplied)

We believe that a reading of these cases referred to by appellant best demonstrates their inapplicability in any attempt to establish the proposition that intrastate sales by a bona-fide wholesaler are "in" interstate commerce merely because the wholesaler at some undetermined time in advance of such sales may have purchased his merchandise from outside the state. Such, we believe is not the law and for the reasons above indicated we think the *Jacksonville Paper Co.* case, *supra*, is here controlling and dictates that the restraint alleged under the facts set forth in this indictment cannot be held to be "in" interstate commerce.

II. The Indictment Does Not Allege a Restraint "Affecting" Interstate Commerce.

As an alternative basis for sustaining this indictment, appellant urges that it alleges a restraint which "affects" interstate commerce within the meaning of the Sherman Act. (Brief for Appellant, pp. 23-31).

Appellees concur in the position of appellant that purely local activities *may* be subject to federal regulation even though the practices concern intrastate commerce and even though "no part of the product is intended for interstate commerce or intermingled with the subjects thereof." *Wickard v. Filburn*, 317 U. S. 111, 120, 87 L. ed. 122, 132. (Brief for Appellant, p. 23).

Appellees also concur that the test as to whether or not such local activities are subject to federal regulation is stated in *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219, 234, 92 L. ed. 1328, 1339, where Justice Rut-

ledge wrote (quoted incorrectly in Brief for Appellant, by omitting words italicized below, pp. 24-25):

“For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, *the vital question becomes whether* the effect is sufficiently substantial and adverse to Congress’ paramount policy declared in the Act’s terms to constitute a forbidden consequence. If so, the restraint must fall . . .”

This test in the application of the federal commerce power to local activities has been enunciated by the Supreme Court on numerous occasions and in connection with the inquiry as to the scope of the commerce clause for varying purposes. With reference to all of such pronouncements and attendant invocation of the federal commerce power, two significant observations may be made.

First, *the relation of these local activities to interstate commerce must be close and the effects of such activities upon interstate commerce must be substantial*. This requirement is stated in varying ways, illustrative of which are the following: “the reach of that power extends to those intrastate activities which *in a substantial way* interfere with or obstruct,” *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 119, 86 L. ed. 726, 732 (Agriculture Marketing Agreement Act); “even if appellee’s activity be local * * * it may still * * * be reached * * * if it exerts a *substantial economic effect* on interstate commerce,” *Wickard v. Filburn*, 317 U. S. 111, 125, 87 L. ed. 122, 135 (Agriculture Adjustment Act); “It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a *close and substantial relation* to interstate commerce,” *Santa Cruz Packing Co. v. N.L.R.B.*, 303 U. S. 453, 466, 82 L. ed. 954, 960 (National

Labor Relations Act); "the power * * * extends to the regulation * * * of activities intrastate which have a *substantial effect* on the commerce," *United States v. Darby*, 312 U. S. 100, 119-120, 85 L. ed. 609, 620 (Fair Labor Standards Act); "although activities may be intrastate in character when separately considered, if they have such a *close and substantial relation* to interstate commerce * * * Congress cannot be denied the power * * *" And "intrastate activities, by reason of *close and intimate relation* to interstate commerce, may fall within Federal control." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37, 38, 81 L. ed. 893, 911, 912 (National Labor Relations Act); see also the dissenting opinion of Justice Jackson in *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 587, 88 L. ed. 1440, 1476.

Secondly, it may be observed that this "substantial effect" is determined upon a factual inquiry into the circumstances presented by each particular case. This is made eloquently plain by the many pages of discussion of the facts presented in the cases above cited as well as the following illustrative comments: "under the Commerce Clause * * * questions of the power of Congress are * * * to be determined by * * * consideration of the *actual effects* of the activity in question upon interstate commerce," *Wickard v. Filburn*, 317 U. S. 111, 120, 87 L. ed. 122, 132; "[Regarding] the doctrine that Congress may provide for regulation of activities not themselves interstate commerce but merely 'affecting' such commerce * * *. In applying this doctrine to particular situations this Court properly has been cautious, and has required *clear findings* before subjecting local business to paramount Federal regulation," Black, J., concurring, *Polish National Alliance v. N.L.R.B.*, 322 U. S. 643, 652, 88 L. ed. 1509, 1517; "These *findings* are not challenged. The threatened consequences to interstate commerce are * * *

*immediate and * * * certain * * *.*" *N.L.R.B. v. Fainblatt*, 306 U. S. 601, 609, 83 L. ed. 1014, 1020; "The statute * * * includes those which unduly cause such restraint *in fact*," *Industrial Association of San Francisco v. United States*, 268 U. S. 64, 77, 69 L. ed. 849, 853-854; "It is not necessary again to *detail the facts* as to respondent's enterprise * * * it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce * * *." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 43, 81 L. ed. 893, 915; and see the above quoted passage from the *Mandeville* decision, *supra*, p. 25, where it is said that there must be "*a showing of actual or threatened effect upon interstate commerce.*"

We believe that the law is clear and unequivocal that local activities (i.e., activities which cannot be held to be "in" interstate commerce) may be subject to federal regulation *if* they have a *substantial effect* upon interstate commerce which effect is shown by the *facts* at hand. In short, the test enunciated in the *Mandeville* decision as quoted above (*supra*, p. 25) is that of a *substantial factual effect* upon interstate commerce.

This principle had its origins in the "Shreveport doctrine" evolved by the Supreme Court in those cases arising out of the regulation of intrastate railroad rates by the Interstate Commerce Commission. In subsequent years the doctrine has been extended from the transportation field "to general application," and "it was inevitable that the approach would be extended to the productive and industrial phases of the national economy and the statutes regulating them, including the Sherman Act." *Mandeville Island Farms v. American C. S. Company*, note 11, 334 U. S. 219, 232, 92 L. ed. 1328, 1338.

But in applying the Shreveport doctrine in the field of

transportation, as in the cases set forth above which utilize the Shreveport or "affecting" commerce approach in other fields, federal intervention in the area of intrastate transportation has been permitted *only upon a clear factual showing and finding* that the particular intrastate rates unjustly discriminated against and substantially burdened interstate commerce. Without that clear factual basis, federal regulation of intrastate transportation has been proscribed. In the *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S. 352, 57 L. ed. 1511, the Supreme Court was asked to abrogate the entire system of intrastate rates, established by the State of Minnesota, on the theory that the State could no longer exercise state-wide authority over such rates in view of the Interstate Commerce Commission's control over interstate rates. The Supreme Court dismissed the actions on the ground that mere differences between interstate and intrastate rates did not render the intrastate rates invalid *in the absence of a clear factual showing* that those rates had a substantial adverse effect on interstate rates. On the other hand, in the case which first announced the Shreveport doctrine, *Houston E. & W. T. R. Co. v. United States*, 234 U. S. 342, 58 L. ed. 1341, the Supreme Court sustained an Interstate Commerce Commission order requiring that particular intrastate rates be brought into parity with comparable interstate rates where a clear showing was made and embraced in a finding by the Commission that the intrastate rates unjustly discriminated against and burdened interstate commerce.

In its subsequent application, the Shreveport doctrine has been uniformly confined to those instances in which a proper factual showing of unjust discrimination has been made. The principle is still so applied under the Interstate Commerce Act which, as amended, embodies the Shreveport doctrine in statutory form. In the recent case of *North Carolina v. United States*, 325 U. S. 507, 89 L. ed. 1760, the In-

terstate Commerce Commission attempted to strike down intrastate rates upon a showing only that non-uniformity existed between intrastate and interstate rates. The Supreme Court refused to uphold the Commission order in the absence of a clear factual showing of unjust discrimination and emphatically reiterated, in the following language, the rule governing application of the Shreveport doctrine (325 U.S. at 511, 89 L. ed. at 1765):

“Intrastate transportation is primarily the concern of the state. The power of the Interstate Commerce Commission with reference to such intrastate rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. * * * Before the Commission can nullify a state rate, justification for the ‘exercise of the federal power must clearly appear’.”

A. The Mandeville and Frankfort Distilleries Decisions.

As indicated above, Justice Rutledge in the *Mandeville* decision gave formal expression to the extension of the Shreveport doctrine to the Sherman Act (334 U.S. at 232-235, 92 L. ed. at 1338, 1339, with which compare *F.T.C. v. Bunte Brothers*, 312 U.S. 349, 85 L. ed. 881) although as there recognized numerous opinions of this and other courts had adopted its result in judicial decision. Indeed the decision of this Court as well as the court below in the *Mandeville* case itself [159 F. (2d) 71 (C.C.A. 9, 1947); 64 F. Supp. 265 (S.D. Calif. 1946)] accepted the Shreveport test, this Court observing that “the more accurate expression is ‘Substantial economic effect’ on interstate commerce” (159 F. (2d) at 72). This Court, however, and the dissenting Justices in the Supreme Court were of the opinion that the amended pleadings “completely eliminated the charge that the agreements complained of affected the price of sugar in interstate commerce” (334 U.S. at 247, 92 L. ed. at 1346).

The *Mandeville* case as expressed in the Supreme Court majority opinion dealt with a "semi-perishable" product (note 2, 334 U.S. at 222, 92 L. ed. at 1333) in an "industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar" (334 U.S. at 239, 92 L. ed. at 1342) and "completely interlocked in all its stages by all-inclusive contract as well as by industrial structure and organization" (334 U.S. at 243, 92 L. ed. at 1344), the "inextricable relationship between the interstate and the intrastate effects" being "shown perhaps most clearly by the provision of the uniform price agreement which ties in the price paid for beets with the price received for sugar" (334 U.S. at 241-242, 92 L. ed. at 1343). The elaborate analysis of facts (334 U.S. at 222-227, 239-244, 92 L. ed. at 1332-1335, 1342-1344) was based upon allegations which were said to be "comprehensive and, for the greater part, specific, concerning both the restraints and their effects" (334 U.S. at 246, 92 L. ed. at 1345) and which disclosed "the industry's unique structure and special mode of operation" (334 U.S. at 225, 92 L. ed. at 1334). Although this decision might well be analyzed as relating only to those activities "in the current of commerce," the Court concluded upon these allegations that "those acts are shown to produce the forbidden effects upon commerce" (334 U.S. at 235, 92 L. ed. at 1340) under the test enunciated above (*supra* pp. 25-26).

With reference to local price restraints of the nature alleged in the indictment here under consideration, Justice Rutledge laid down what we believe to be the controlling principles governing this appeal. Speaking for the majority of the Court, he wrote (334 U.S. 236-237, 92 L. ed. 1340-1341):

"* * * And a conspiracy with the ultimate object of

fixing local retail prices is within the Act, if the means adopted for its accomplishment reach beyond the boundaries of one state. * * *

* * *

“Moreover, as we said in the *Frankfort Distilleries Case*, ‘there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states.’ 324 U.S. 293, 297, 89 L. ed. 951, 955, 65 S. Ct. 661.”

The facts, the language and the holding of the *Frankfort Distilleries* case, 324 U.S. 293, 89 L. ed. 951, related to an intrastate price fixing conspiracy between wholesalers and retailers where “the means adopted for its accomplishment reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts” (324 U.S. at 298, 89 L. ed. at 956).

These recent opinions of the Supreme Court in the *Mandeville* and *Frankfort Distilleries* cases clearly indicate that a restraint of so called local or intrastate commerce can only be a violation of the Sherman Act when the “means adopted for its accomplishment reach beyond” interstate boundaries or the conduct is “an inseparable element of a larger program” directed against persons or activity beyond the state lines in question. No such extra-state factors are alleged in the indictment before this Court and we submit that an application of the principles announced in the *Frankfort Distilleries* and *Mandeville* cases dictates the conclusion reached by the trial court—that this indictment must be dismissed. This indictment does not allege a combination by

these defendants with any person outside the State of Washington. This indictment does not allege that any combination or activity of these defendants was directed against any person outside the State of Washington, nor is it alleged that the "means adopted for its accomplishment reach beyond the boundaries" of this state. The course of conduct here alleged is "wholly within" this state and is directed only at the local activity and sales within the State of Washington. The "effect upon interstate commerce" which is "sufficiently substantial" to meet the test suggested in the *Mandeville* case has not been alleged in this indictment. See *C. S. Smith Metropolitan Market v. Food & Grocery Bureau of Southern California*, 33 F. Supp. 539 (S.D. Cal., 1939); *United States v. San Francisco Electrical Contractors Association*, 57 F. Supp. 57 (N.D. Cal., 1944); *Ewing-Von Allmen Dairy Co. v. C. and C. Ice Cream Co.*, 109 F. (2d) 898 (C.C.A. 6, 1940), cert. den. 312 U.S. 689, 85 L. ed. 1126.

In this connection we desire to call the Court's attention to the fact that the necessity for establishing the "effect" of any local restraint alleged upon interstate commerce is not obviated by the fact that the restraint alleged is a price fixing agreement. Under the rule of *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 84 L. ed. 1129, the allegation of a price fixing agreement characterizes it *per se* as an unreasonable restraint and of the character condemned by the Sherman Act. A price fixing agreement is, in the language of the *Mandeville* decision, "a restraint of the type forbidden by the Act," (334 U.S. at 234, 92 L. ed. at 1328). This is not, however, an allegation of the "effect" on interstate commerce which is of necessity a separate and distinct matter as the decisions in the *Frankfort Distilleries* and *Mandeville* cases plainly demonstrate. As stated in *United States v. Sheffield Farms Co.*, 43 F. Supp. 1, 4 (S.D.N.Y. 1942):

"Agreements fixing the prices of articles moving in interstate commerce are unlawful per se under the Sherman Act because they eliminate competition. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 47 S. Ct. 377, 71 L. ed. 700, 50 A.L.R. 989; *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129. Thus, the question to be determined is whether the indictment sufficiently charges a combination or conspiracy affecting interstate commerce."

We challenge the appellant to point out in this indictment any allegations of fact answering "the vital question" posed in the *Mandeville* decision of a "showing of actual or threatened effect upon interstate commerce." (334 U.S. at 234, 92 L. ed. at 1339)

B. Allegations of Conclusions Are Insufficient.

The sole allegation in this indictment which can conceivably be urged to establish "effect" upon interstate commerce is contained in Paragraph 21 (R. 14-15) where it is stated:

"The purpose, intent and necessary effect of the aforesaid combination and conspiracy has been and is:

* * *

"(c) To directly, substantially and unreasonably burden and restrain the flow in interstate trade and commerce of Chrysler replacement parts and engines. * * *"

That allegation is clearly nothing more than a conclusion of law. The Supreme Court has so characterized a similar allegation in *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 56-7, 82 L. ed. 646, 648. There the complaint alleged "that neither the Company's business nor its relations with its employees affected interstate or foreign commerce." The Court held that the allegation was a con-

clusion of law, not an allegation of fact, and was therefore not admitted by a motion to dismiss. The Court said:

“The Company insists that since the case was heard on motion to dismiss the bill which alleges that the Company is not engaged in interstate or foreign commerce and its relations to its employees do not affect such commerce, these allegations must be accepted as true. The motion admits as facts allegations describing the manner in which the business is carried on, but not legal conclusions from those facts. The allegations that interstate or foreign commerce is not involved are conclusions of law.”

Compare *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F. (2d) 742, 745, (C.C.A. 9, 1936), cert. den. 299 U.S. 613, 81 L. ed. 452, where this Court observed with reference to allegations under the Sherman Act:

“The general allegation of interference with interstate commerce is a conclusion of law and is controlled by the specific allegation of facts as to the nature of appellant’s business.”

In *United States v. French Bauer*, 48 F. Supp. 260 (S.D. Ohio 1942) a Sherman Act indictment precisely similar on this issue to the one here in question was dismissed because of its failure to allege *facts* sufficient to establish that an intrastate price fixing agreement substantially affected interstate commerce. The court said:

“When the government invokes jurisdiction of the court to determine whether a particular conspiracy or particular acts alleged to constitute a conspiracy are reached by the Sherman Act, I think it clear that facts must be alleged, which, if established by proof, would bring the acts complained of within the scope or reach of the Sherman Act.

* * *

"My idea of the law is that in view of the authorities which hold that an intrastate conspiracy is not within the Sherman Act unless it directly and substantially affects interstate commerce, it is necessary in an indictment or in a civil pleading seeking relief under the Sherman Act that not merely conclusions but factual allegations be made which are sufficient to show direct and substantial impact upon interstate commerce."

The same view was expressed in *United States v. Greater Kansas City Chapter, National Electrical Contractors Assn., et al*, 82 F. Supp. 147 (W.D. Mo. 1949) where the Court dismissed an indictment under the Sherman Act for the same reason, stating (82 F. Supp. at 148-9):

"In an indictment it is not sufficient merely to state as a conclusion that the combination or agreement was in restraint of trade but such details must be given as to show in what manner interstate commerce or trade was restrained by the alleged contract, combination or conspiracy."

See also: *Boro Hall Corp. v. General Motors Corp.*, 37 F. Supp. 999 (S.D.N.Y. 1941), affirmed in 124 F. (2d) 822 (C.C.A. 2, 1942) cert. denied 317 U.S. 695, 87 L. ed. 556; *C. S. Smith Metropolitan Market Co. v. Food & Grocery Bureau of So. California*, 33 F. Supp. 539 (S.D.Calif. 1939); *United States v. Morgan*, 10 F. Supp. 382 (E.D. Ill. 1935); *United States v. Kinnebrew Motor Co.*, 8 F. Supp. 535 (W.D. Okla. 1934).

Rule 7(c), Federal Rules of Criminal Procedure, 18 U.S.C.A. following § 687, requires that "the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Appellees submit that a reading of the indictment here in question best dispels any suggestion that it alleges

“the essential facts” “showing actual or threatened substantial effect upon interstate commerce”.

C. Cases Relied Upon by Appellant.

We believe that the cases cited and relied upon by the appellant support and can be understood only in terms of the rationale of the *Mandeville* case as above discussed. In short, those restraints which have been condemned under the Sherman Act have in fact been shown to have a substantial and adverse effect upon interstate commerce.

In *United States v. Women's Sportswear Association*, 336 U.S. 440, 93 L. ed. (adv. op.) 619, the defendant stitching contractors had consummated a restrictive agreement “of the type condemned by the Act” with jobbers who were found to “maintain a current of commerce, substantial in volume and interstate in character” (336 U.S. at 461, 93 L. ed. (adv. op.) at 621). Upon the record established by trial in the court below the Supreme Court concluded that “the business affected by the restraint is interstate commerce” (336 U.S. at 464, 93 L. ed. (adv. op.) at 623). The case is we submit but another application of the well established principle that restraints, otherwise local in character, which are applied to the “current” or “throat” of interstate commerce are subject to the federal commerce power where the effects of such restraints upon interstate commerce are shown to exist. *Swift & Co. v. United States*, 196 U.S. 375, 49 L. ed. 518; *Stafford v. Wallace*, 258 U.S. 495, 66 L. ed. 735; and see *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 83 L. ed. 1014. The decision is not of assistance we believe in considering an intrastate restraint operative after interstate commerce has ended where there are alleged no facts showing a substantial effect upon commerce among the states.

With reference to *Local 167 v. United States*, 291 U.S. 293, 78 L. ed. 804, we believe that the discussion of this case above at pp. 19-20 sufficiently indicates a conspiracy where, as stated in the *Mandeville* case, "the means adopted for its accomplishment reach beyond the boundaries of one state" (334 U.S. at 236, 92 L. ed. at 1340); and compare *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 89 L. ed. 951. Also we believe, in the *Local 167* case, there appears the "substantial economic effect" upon interstate commerce from the facts there disclosed.

So also are the multi-state ramifications of the conspiracy in *United States v. General Motors Corp.*, 121 F. (2d) 376 (C.C.A. 7, 1941) spelled out by the facts discussed in this opinion. The Circuit Court of Appeals opinion states (p. 382-383):

"In essence the indictment charges that the defendants conspired to restrain unreasonably the interstate trade and commerce in * * * and * * * that their purpose was to control the financing essential to the wholesale purchase and retail sale of General Motors cars; and that in furtherance of this purpose the conspirators devoted themselves to concerted action by which G.M.A.C. financing was imposed on dealers who were engaged in the purchase and sale of the above described cars."

It would be difficult to conceive of a conspiracy more clearly falling within the rule of the *Frankfort Distilleries* case whose "means adopted for its accomplishment reached beyond the boundaries" of a single state (324 U.S. at 298, 89 L. ed. at 956) than is outlined in the indictment and facts set forth in the *General Motors* case (121 F. (2d) at 382-383, 385-397).

Likewise in *United States v. Mountain States Lumber Dealers Ass'n.*, 40 F. Supp. 460 (D. Colo. 1941) cited by

appellant, the multi-state ramifications of the conspiracy involved and the relationship of the local wholesalers to out of state manufacturers appears from the opinion and the companion opinion therein incorporated of *United States v. National Retail Lumber Dealers Ass'n.*, 40 F. Supp. 448 (D. Colo. 1941).

Appellant relies upon and considers as determinative of this case, two decisions of this Court in *Food and Grocery Bureau of Southern California v. United States*, 139 F. (2d) 973 (C.C.A. 9, 1943) and *California Retail Grocers & Merchants Association v. United States*, 139 F. (2d) 978, (C.C.A. 9, 1943) cert. denied 322 U.S. 729, 88 L. ed. 1564. In considering the signifi- cance of these two decisions we should like to call the Court's attention to the discussion above of the *Frankfort Distilleries* case, supra pp. 31-32, and the following passages from that opinion (324 U.S. at 295, 299, 89 L. ed. at 954, 956):

“ * * * it is alleged that they adopted the following course of action. All of the respondents agreed amongst themselves to (1) discuss, agree upon and adopt arbitrary non-competitive retail prices, markups, and margins of profit; (2) defendant retailers and wholesalers agreed to persuade and compel producers to enter into fair trade contracts on every type and brand of alcoholic beverage shipped into the state, thereby to establish arbitrarily high and non-competitive retail markups and margins of profit, agreed upon by defendants; * * *

* * *

“The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance. Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the

boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts. Nor did the boycott used merely affect local retail business. Local purchasing power was the weapon used to force producers making interstate sales to fix prices against their will. * * * ”

In the light of these pronouncements we call attention to the following comments in the two opinions of this Court relied upon by appellant. In the *Food and Grocery Bureau* case this Court observed (139 F. (2d) at 977):

“The record also portrays clearly the measures pursued by appellants to insure compliance with their distribution and price-fixing policies on the part of manufacturers and distributors * * * including such out-of-state manufacturers and national distributors as * * * the purpose of which was to compel soap manufacturers to cease selling certain types of their products to a certain * * * organization.”

and in the *California Retail Grocers* case it is said (139 F. (2d) at 983):

“Again as in the Southern California case, the conspiracy aimed to fix all minimum retail prices whether of an out-of-state wholesaler making an interstate sale or a retailer selling goods he had imported from out-of-the state or intrastate sales by retailers of goods produced within the state. The purpose of the conspiracy was to ‘stabilize’ the entire trade in California in all sales, whether interstate or intrastate.”

In the light of the observations of the Supreme Court in the *Frankfort Distilleries* and *Mandeville* decisions (supra pp. 29-33) we submit that the attempt of the appellant to apply these cases to the allegations of the indictment here

under consideration is simply without foundation. Appellant states "The fact that in the food cases the attempt was made to enforce the price restrictions upon out-of-state vendors is of no significance" (Brief for Appellant, p. 25). If the decisions of the United States Supreme Court have any meaning it is to teach us that this fact is of paramount significance.

This Court in the food cases did not nor has it varied from the principle that local price restraints are within the Sherman Act *if* a substantial economic effect upon interstate commerce is shown to exist. See *Mandeville Island Farms Inc. v. American Crystal Sugar Co.*, 159 F. (2d) 71 (C.C.A. 9, 1947). Nor did the trial judge vary from this principle when, with reference to the allegations of the indictment in *United States v. Food and Grocery Bureau*, 41 F. Supp. 884, 886 (S.D. Calif. 1941), he wrote:

"And there are adequate allegations in the indictment to show that, despite the apparent local character of the activities of the defendants, the direct aim, purpose and effect of their acts is the kind of restraint of interstate commerce which these cases denounce. * * * "

In this connection see *C. S. Smith Metropolitan Market Co. v. Food & Grocery Bureau of Southern California, Inc.*, 33 F. Supp. 539, 540 (S.D. Calif. 1939) and compare also *United States v. San Francisco Electrical Contractors Association*, 57 F. Supp. 57, 68 (N.D. Calif. 1944).

Under the rationale of the *Frankfort Distilleries* case, an intrastate transaction can be brought within the Sherman Act only by alleging facts and proving the extra-state operation of the local transaction. As pointed out above, in each of the Sherman Act cases cited by appellant that extra-state operation was clearly alleged and/or proved. Those cases fall squarely within the pattern of the *Frankfort Distilleries* case. On the other hand, those indictments and complaints

which have not alleged facts showing the substantial impact of an intrastate transaction on interstate commerce—i. e. have failed to demonstrate the extra-state operation of the local activity—have uniformly been dismissed as failing to state an offense under the Sherman Act, *United States v. French Bauer*, 48 F. Supp. 260 (S.D. Ohio 1942); *C. S. Smith Metropolitan Market v. Food & Grocery Bureau of So. California*, 33 F. Supp. 539 (S.D. Calif. 1939); *Boro Hall Corp. v. General Motors Corp.*, 37 F. Supp. 999 (S.D.N.Y., 1941) aff'd. 124 F. (2d) 822 (C.C.A. 2, 1942), cert. den. 317 U.S. 695, 87 L. ed. 556; *United States v. San Francisco Electrical Contractors Association*, 57 F. Supp. 57 (N.D. Cal. 1944); *United States v. Greater Kansas City Chapter, National Electrical Contractors Assn., et al*, 82 F. Supp. 147 (W.D. Mo. 1949); compare *Industrial Association of San Francisco v. United States*, 268 U.S. 64, 83-84, 69 L. ed. 849, 856.

In support of its argument that this indictment alleges a restraint "affecting" interstate commerce, appellant cites and relies upon a number of cases arising under the National Labor Relations Act. Rather than discuss each of these cases in detail we prefer to analyze the premises which we believe underlie all of them.

As indicated above (supra pp. 25-26) the test involved in determining the application of the federal commerce power under the National Labor Relations Act is no different from the test employed with reference to other exertions of the commerce power. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 38, 81 L. ed. 893, 911, 912; *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 609, 83 L. ed. 1014, 1020; *Santa Cruz Fruit Packing Co. v. N.L.R.B.*, 303 U.S. 453, 466, 82 L. ed. 954, 960. The inquiry in each instance is as to whether or not under the circumstances at hand there is a "substan-

tial economic effect" upon interstate commerce and as observed by Chief Justice Hughes in the *Santa Cruz Packing* case it is plain that the test "cannot be applied by a mere reference to percentages" (303 U.S. at 467, 82 L. ed. 961).

A factual determination of substantial effect "is left to be determined as individual cases arise" (*Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 222, 83 L. ed. 126, 136) but the significant point is that under the National Labor Relations Act "Congress * * * left it to the Board to ascertain whether proscribed practices would in particular situations affect commerce when judged by the full reach of the constitutional power of Congress" (*Polish National Alliance v. N.L.R.B.*, 322 U.S. 643, 648, 88 L. ed. 1509, 1515).

As stated in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32, 81 L. ed. 893, 908-909):

" * * * Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to Federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. * * * "

Furthermore it is not the function of the Court in cases arising under the National Labor Relations Act to ascertain whether or not the pleadings allege facts showing a substantial economic effect upon interstate commerce, the role of the court in such cases being limited to the inquiry as to whether or not "the Board's finding that respondents' unfair labor practices have led and tend to lead to labor disputes burdening interstate commerce and interfering with its free flow is supported by the evidence" (*N.L.R.B. v. Fainblatt*, 306 U.S. 601, 608, 83 L. ed. 1014, 1020).

Contrariwise, in situations arising on the pleadings under the Sherman Act, it is for the court itself to ascertain from the facts alleged in the pleadings before it whether there is

shown the necessary substantial economic effect upon interstate commerce, a determination which must be made by the court upon such facts unaided by such "inferences or conclusions" as might be permitted an expert body or administrative agency. Compare *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U.S. 52, 60-61, 63 L. ed. 534, 537, 538.

It is stated in *United States v. Darby*, 312 U.S. 100, 120, 85 L. ed. 609, 620:

"In such legislation Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act or whether they come within the statutory definition of the prohibited Act as in the Federal Trade Commission Act. * * * "

Determinations have been made under the National Labor Relations Act that businesses making substantial out of state purchases are not within the coverage of the Act. See, for example, *Bailey Slipper Shop, Inc.*, 84 N.L.R.B. No. 41, Case No. 3-RM-34 (1949) (98% purchased out of state); *Indianapolis Cleaners & Launderers Club*, 85 N.L.R.B. No. 202, Case No. 35-RC-247 (1949); *Fehr Baking Company*, 79 N.L.R.B. 440 (1948); and determinations have also been made that the activities of concerns with insubstantial or no out of state purchases are deemed to be within its terms. *Vulcan Forging Company*, 85 N.L.R.B. No. 114, Case No. 7-C-1769 (1949).

If these labor cases teach anything it is that, as above stated in the *Santa Cruz Packing* case (supra p. 42), the test of "affecting" commerce "cannot be applied by a mere

reference to percentages". Appellant's argument would appear to suggest a mathematical formula by which it could be said that the fact that local concerns make substantial out of state purchases, without more, means that all their activities have a "substantial economic effect" upon interstate commerce. Such we think is not the law nor is it the import of the numerous National Labor Relations Act decisions referred to by the appellant. Compare also *Consolidated Edison Co. v. N.L.R.B.*, 95 F. (2d) 390, 393-394 (C.C.A. 2, 1938), aff'd. 305 U.S. 197, 220, 83 L. ed. 126, 135.

These appellees, it is alleged, make substantial out of state purchases—a situation which is true of every wholesaler and every retailer in America and every other person buying and selling national brand products whether they be Chrysler replacement parts or Wrigley's chewing gum. *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 89 L. ed. 951 holds that this alone is not enough. "A conspiracy with the ultimate object of fixing local retail prices is within the Act, if the means adopted for its accomplishment reach beyond the boundaries of one state." (*Mandeville Island Farms Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 92 L. ed. 1328, 1340). It has not as yet been held that mere out-of-state purchases alone constitute means adopted for the accomplishment of a local price fixing conspiracy "which reach beyond the boundaries of one state" and there are we suggest sound reasons of policy why it should not.

If these appellees are to be charged with a restraint which, under the test of the *Mandeville* case, has a "substantial economic effect" upon interstate commerce we submit that the allegations of fact upon which such a charge can be based must be sought elsewhere than in the allega-

tions of this indictment—and such was the conclusion of the court below.

Appellant's brief (p. 31) eloquently pleads:

“ * * * Appellees, dealers in automobile parts and engines manufactured and purchased outside of the state, an essential part of a great national industry, distributors of merchandise utilized throughout the country as the result of a far-flung and mutually dependent system of transportation and distribution, are surely within the reach of federal control under the commerce clause. * * * ”

Suffice it to observe that this appeal is not concerned with such rhetorical questions. Should these appellees or any of the thousands of other wholesalers and retailers across the nation engage in a restraint where “the means adopted for its accomplishment reach beyond the boundaries of one state” or where the facts otherwise establish a “substantial economic effect” upon interstate commerce, they or any others upon adequate allegations establishing such facts are within “the reach of federal control under the commerce clause” and the prohibitions of the Sherman Act. Such is not the case presented by the indictment before this Court.

III. Sound Federal Policy Does Not Justify the Extension of the Sherman Act Sought by This Indictment

As indicated above the Supreme Court has not extended the reach of the Sherman Act to local intrastate price fixing combinations where the only relationship to interstate commerce alleged is that the wholesalers or retailers involved purchased goods from outside the state at some undetermined time in advance of their intrastate sales. The decided cases have in each instance condemned those restraints which have been, under the standards outlined above, either

“in” or “substantially affecting” interstate commerce as revealed by the allegations of fact contained in the indictment. Not only have the decided cases failed to intimate that a “substantial economic effect” upon interstate commerce is established by the bare allegation that the local sellers involved have purchased from outside the state but there are sound reasons of policy why they have not. To sustain this indictment we submit is to extend the federal anti-trust laws to every phase of the economic and business life of the 48 states, whose pronouncements of their own public policy, as well as capacity to effectuate them, we think must also be respected by this court. See Washington Constitution, Article 12, Section 22.

As stated by Justice Frankfurter in 10 *East 40th Street Bldg. v. Callus*, 325 U.S. 578, 582, 89 L. ed. 1806, 1812, “We must be alert, therefore not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation.”

In *Polish National Alliance v. N.L.R.B.*, 322 U.S. 643, 650, 88 L. ed. 1509, 1516, it is observed:

“The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity.
* * * ”

and it is said in the concurring opinion to this case (322 U.S. at 652, 88 L. ed. at 1517):

“The doctrine that Congress may provide for regulation of activities not themselves interstate commerce,

but merely 'affecting' such commerce, rests on the premise that in certain fact situations the Federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to interstate commerce. In applying this doctrine to particular situations this Court properly has been cautious, and has required clear findings before subjecting local business to paramount Federal regulation. It has insisted upon 'suitable regard to the principle that whenever the Federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the Federal power must clearly appear'."

See also *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 30, 81 L. ed. 893, 907, where Chief Justice Hughes has stated:

" * * * The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several states' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system."

This balancing of the relationships in our federal system between the rights and obligations of our state and federal governments is by nature a delicate operation and has not as yet been resolved by jurisprudentially divining that the actions of the Congress of 1890 have placed the local retailing and wholesaling activities of the nation under the federal anti-trust laws.

There is likewise a sound policy behind the refusal of the courts to sustain those indictments where the only allegations are mere conclusions that the effect of the restraint

alleged has been "to directly, substantially and unreasonably burden and restrain interstate commerce" (cf. R. 14-15). The foundations of American jurisprudence as grounded in the Fifth Amendment require that the accused be advised of the nature of the charge against him.

If indictments by which prosecutions may be begun are not required to allege specific facts which, if proved, constitute a criminal offense then individuals engaged in transactions and businesses purely local in nature and which are admittedly beyond the federal commerce power stand in constant danger of being brought into court and tried on indictments based upon the general conclusions of the pleader that such local transactions are "in" or "substantially affect" interstate commerce. Such conclusions could in a sense be urged as applying to every local sale and transaction throughout the nation but not as yet have the requirements of criminal pleading been met by the allegation of such conclusions with the result of making every accused stand trial to await the bringing forth of those facts from which courts can determine whether or not the Sherman Act or any other exercise of the federal commerce power may be invoked.

Conceptually there is no local sale or transaction which at some point of its circumference may not be said to touch or affect in some degree the outreaches of the current or stream of interstate commerce. This is far from saying however that under the facts disclosed by the decided cases every local transaction has such "substantial economic effect" upon interstate commerce as to bring it within the scope of the Sherman Act. It may or may not have such effect depending upon the facts. If it does, those facts can and should be made to appear in an indictment based upon such facts.

With justification the courts have been zealous in guard-

ing against the danger of vexatious and unwarranted prosecutions and have been careful that this danger should not be permitted to exist through any failure of the courts to require that in indictments under the Sherman Act as well as other federal statutes there must be a statement of specific facts which are not only sufficient to advise the defendant of the precise nature of the charge he is called upon to meet but also to show on the face of the indictment such facts, which if established, require a judicial finding that the defendant has been guilty of some act which is within the scope of federal power and an offense against a federal law.

CONCLUSION

For the reasons and in view of the authorities above set forth, we believe that this indictment does not allege facts showing a restraint either "in" or "substantially affecting" interstate commerce within the Sherman Act and that the judgment of the District Court dismissing the indictment should be sustained.

Respectfully submitted,

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United States
Court of Appeals
for the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

GEORGE RUMEH,
Appellee,

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

BERTHA LUCILLE RHODES,
Appellee.

Transcript of Record

JUN 9 - 1949

Appeals from the United States District Court
for the District of Arizona

PAUL P. O'BRIEN,
CLERK

No. 12237

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for the Ninth Circuit

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NEW

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OF

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Attorneys for Appellees.

In the District Court of the United States
For the District of Arizona

No. Civ. 67—Globe

GEORGE RUMEH,

Plaintiff,

vs.

PACIFIC GREYHOUND LINES, a corporation,
Defendant.

FILINGS—PROCEEDINGS

* * * *

1947

Aug. 4—Defendant's Motion to Consolidate this Cause with Civil-426-Tucson on for hearing. Catlin present for pltf in Civil 426 Tucson and states that plaintiff acquiesces to deft's motion to consolidate and It Is Ordered that said motion be and it is granted and that cause numbered Civ.-426-Tucson be and it is set for trial on September 16, 1947, with Case No. Civ.-67-Globe.

* * * *

1948

Nov. 4—Enter further proceedings of trial. Jury instructed and retire to consider verdict at 10:28; at 3:30 p.m. all counsel pres. jury verdicts: \$21,000.00 for pltf. Rumeh and \$11,000.00 for pltf. Rhodes. Order clerk enter judgments according to the verdicts.

* * * *

1949

Mar. 31—Fwd copies of Notice of Appeal to counsel for pltf.

In the District Court of the United States
For the District of Arizona

No. Civ.-426-Tucson

BERTHA LUCILLE RHODES, Plaintiff,
vs.

PACIFIC GREYHOUND LINES, a corporation,
Defendant.

FILINGS—PROCEEDINGS

1947

July 8—File Record on Removal from Superior Court of Pima County: (Complaint: Summons and return thereon, Affidavit of Service by Mail, Notice of Petition for Removal, Petition for Removal of Cause to U. S. Dist. Court, Bond for Removal, Order for Removal, Minute Entry.) * * * *

1947

Aug. 4—Plaintiff's Motion for Trial Setting and Defendant's Motion to Consolidate this Cause with Cause No. 67-Globe on for hearing. Catlin present for plaintiff, no appearance by or on behalf of defendant. Said counsel for plaintiff states that plaintiff acquiesces to Defendant's Motion to Consolidate this case with Civ.-67-Globe and to the setting of this cause for trial on September 16, 1947, with Civ.-426-Tuc. Whereupon, It Is Ordered that defendant's Motion to Consolidate this cause with Civ.-67-Globe be and it is granted and it is further ordered that this case be set for trial September 16, 1947. * * * *

1948

Nov. 4—Enter judgment on the verdict for the plf.
Rhodes against the deft. in the sum of
\$11,000.00.

Nov. 4—Enter judgment in J. D.

* * * *

1949

Mar. 31—Fwd copy of Notice of Appeal to Messrs.
Hall, Catlin & Molloy, and to A. L. Carlton.

* * * *

In the District Court of the United States
For the District of Arizona

No. Civ.-67-Globe

GEORGE RUMEH,

Plaintiff,

vs.

PACIFIC GREYHOUND LINES, a corporation,
Defendant.

COMPLAINT

To the Honorable Judge of said Court:

Comes now George Rumeh, Plaintiff in the above-entitled and numbered case and for cause of action against the defendant, the Pacific Greyhound Lines, a corporation, alleges and shows the Court as follows:

I.

That this is an action at law between citizens of different states, and the amount in controversy in this suit, exclusive of interest and costs, exceeds the sum of Three Thousand (\$3,000.00) Dollars; that

Plaintiff, George Rumeh, is a citizen and resident of the State of Arizona, and resides in the City of Claypool, Gila County, Arizona, and the Defendant, the Pacific Greyhound Lines, is a corporation duly incorporated under the laws of the State of California, and is conducting the business of a common carrier, carrying passengers for hire in and through the State of Arizona; that said defendant has no statutory agent in Pima County, Arizona, upon whom service may be had.

II.

That on March 25, 1946, Plaintiff, George Rumeh, was a paid passenger on Defendant, Pacific Greyhound Lines bus from Miami, Arizona, to El Paso, Texas, said bus being operated by and under the exclusive control of Cody Bach, who was an employee and agent of said Defendant, and that while the said Defendant was so carrying the Plaintiff in said bus as a passenger and at about 6:10 o'clock p.m. on that date when it had reached a point about eight miles west of the City of Las Cruces, in Dona Ana County in the State of New Mexico, the said Defendant and its agent and employee, Cody Bach, did with such negligence and want of ordinary care run and operate and manage the said bus, so as to cause it to collide with an automobile approaching it from the opposite direction on said road in such a violent manner that Plaintiff was thrown through the windshield and front window of said bus and thereby suffered the injuries hereinafter alleged.

III.

That by reason of the aforesaid negligence of the Defendant, Pacific Greyhound Lines, and its agents

and employees, and the collision as heretofore alleged, and as a direct and proximate result thereof, the Plaintiff received numerous cuts, wounds, bruises and internal injuries to his head, neck, shoulders, arms, back, spine, chest, abdomen, hips, legs, and practically all parts of his body, of which he cannot give a more accurate description other than to say that they have been, and still are, the seats of constant pain; his right shoulder joint was fractured; his ribs were broken; the bridge of his nose was fractured; his scalp was badly cut and lacerated, and he received other cuts, bruises and lacerations too numerous to here mention in detail.

IV.

Prior to said injuries, Plaintiff had had pulmonary tuberculosis in his right lung which had been collapsed with artificial pneumothorax from 1930 to 1931, and the disease had become arrested and Plaintiff had been able to return to work and had worked and followed his occupation of operating a store since 1934, but as a direct and proximate result of the negligence of the said Defendant, Pacific Greyhound Lines, and its agents and employees and the said collision and the injuries he sustained therein, his tubercular condition was very much aggravated and the disease has been reactivated and he has been confined to his bed, and such condition will continue for a long period of time, if it is not permanent.

V.

That, as a result of the fracture of Plaintiff's right shoulder, as heretofore alleged, he has lost ninety per cent of the use of the shoulder joint, and such condition is permanent.

VI.

That, by reason of the said injuries, the Plaintiff has suffered great physical and mental pain and anguish, and that such suffering will continue in the future and be permanent.

VII.

That, by reason of the said injuries, he has been subjected to a violent shock and was thrown into a condition of chronic nervousness and made sick, sore and lame and disordered, including dizziness, headaches, backaches and insomnia, and his capacity to work and labor and for the enjoyment of life has been substantially and materially reduced and diminished, if not destroyed altogether, and such conditions will continue in the future and be permanent.

VIII.

That, by reason of the said injuries, the Plaintiff has been subjected to large expenses for medical attendance and surgical treatment, drugs and medicines, and for care and nursing in reasonable efforts to cure the results of said injuries, and he will necessarily be subjected to like charges for the same purpose in the future.

IX.

That plaintiff, at the time of said injuries, was thirty-nine years old, a married man with a wife and one child, six years old, wholly dependent upon him for support, and he had a life expectancy of approximately thirty years and had been able to work, and was working and earning from Twenty-five Hundred (\$2,500.00) Dollars to Three Thousand (\$3,000.00) Dollars per year.

X.

That, by reason of the foregoing injuries, the pain and suffering, past, present and future, the loss of earning capacity, past, present and future, and the medical expenses incurred and paid and to be incurred and paid in the future, Plaintiff has suffered damages in the sum of Ninety-five Thousand (\$95,000.00) Dollars.

Wherefore, Plaintiff prays that the Defendant, Pacific Greyhound Lines, be cited to appear and answer this Complaint, and that, after a full and final hearing thereon, he have judgment against the said Defendant for his damages in the sum of Ninety-five Thousand (\$95,000.00) Dollars, costs of this action, and all other and further relief, either at law or in equity, to which he may have shown himself justly entitled.

DAVID J. SMITH,
KRUCKER & FOWLER,

By /s/ SAMUEL H. FOWLER,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 24, 1946.

[Title of District Court and Cause No. 67.]

ANSWER

Now comes the defendant above-named, by its attorneys, and for answer to plaintiff's complaint:

First Defense

For a First Defense to said complaint, defendant admits, denies and alleges as follows:

I.

Answering Paragraph I of the complaint, defendant admits the averments therein contained.

II.

Answering Paragraph II of the complaint, defendant admits that on or about March 25, 1946, the plaintiff was a paid passenger upon one of defendant's buses; that said bus was being operated by one Cody Bach who was an employee and agent of the defendant, but defendant denies that said bus was under the exclusive control of said Cody Bach; defendant admits that while the plaintiff was a passenger in said bus, and at the hour of about 6:00 o'clock p.m. on March 25, 1946, when said bus was at a point about 10 miles West of the City of Las Cruces, State of New Mexico, an automobile approaching from the opposite direction to that pursued by the bus violently collided with said bus; defendant denies generally and specifically each and every allegation in said Paragraph II of the complaint contained, save and except those hereinbefore expressly admitted.

III.

Answering Paragraph III of the complaint, defendant denies generally and specifically each and every allegation therein contained.

IV.

Answering Paragraph IV of plaintiff's complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averment to the effect that prior to said collision plaintiff had had pulmonary tuberculosis in his

right lung and that the disease had become arrested, and that plaintiff had been able to return to work and had worked and followed his occupation of operating a store since 1934, and defendant requires strict proof of said averment; defendant denies that there was any negligence whatever on the part of the defendant, or any of its agents or employees, and defendant denies that the said collision and plaintiff's injuries, if any, were cause in any manner or form by any negligence on the part of the defendant, or any of its agents or employees; defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments to the effect that plaintiff's tubercular condition was aggravated by the said collision or that the disease had been reactivated or that plaintiff has been confined to his bed, or that such condition will continue for a long period of time, and defendant requires strict proof thereof; but defendant denies that such aggravation and reactivating of plaintiff's tubercular condition, or his confinement to bed, if such facts be true, were in any manner or form caused or brought on by any negligence on the part of defendant, or any of its agents or employees.

V.

Answering Paragraph V of plaintiff's complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained, and requires strict proof thereof.

VI.

Answering Paragraph VI of plaintiff's complaint,

defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained, and requires strict proof thereof.

VII.

Answering Paragraph VII of plaintiff's complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained, and requires strict proof thereof.

VIII.

Answering Paragraph VIII of plaintiff's complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained, and requires strict proof thereof.

IX.

Answering Paragraph IX of plaintiff's complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained and requires strict proof thereof.

X.

Answering Paragraph X of plaintiff's complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained, and requires strict proof thereof.

Second Defense

For a Second Defense to plaintiff's complaint, defendant alleges as follows:

That at the time and place of the accident and collision set forth in plaintiff's complaint, an emergency arose and confronted the driver of defendant's passenger bus and the said driver was placed in the position of and suddenly confronted by imminent peril in that while said driver was in a careful manner operating the bus containing passengers on the highway about 10 miles West of Las Cruces, New Mexico, and was proceeding in an easterly direction, the driver of an automobile which was not owned or controlled by the defendant, and which was proceeding westerly on said highway, approaching the bus, negligently, carelessly, suddenly and abruptly and without any signal or warning whatsoever, turned his said automobile from his right hand side of the highway to his left hand side of the highway and immediately in front of the bus and caused his said automobile to collide head-on with said bus; that the driver of said bus was then and there met with a sudden and immediate emergency and was suddenly and abruptly confronted with imminent peril endangering the lives and safety of the passengers in said bus, and said driver in said emergency, used his best judgment under the circumstances and used and exercised his best efforts to avoid the collision and to avoid injury to the said passengers and to others, and said emergency did not arise by and was not caused by the fault or negligence of the said driver

or of the said defendant, or of any of defendant's agents or employees.

Wherefore, defendant prays that plaintiff take nothing by his complaint, and that defendant recover its costs and expenses in this case expended or incurred.

BAKER & WHITNEY,
By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Nov. 19, 1946.

In the Superior Court of the State of Arizona,
In and For the County of Pima

No. 28681

BERTHA LUCILLE RHODES,

Plaintiff,

vs.

PACIFIC GREYHOUND LINES,

Defendant.

COMPLAINT

Comes now the plaintiff and for her cause of action against the defendant, alleges:

I.

That the plaintiff is a resident of Pima County, State of Arizona and defendant is a duly organized

and registered foreign corporation and a common motor carrier of passengers, doing business in Pima County, State of Arizona.

II.

That on or about the 24th day of March, 1946, the plaintiff did purchase a ticket from the defendant bus line in Safford, Arizona, entitling her to passage from that city to Clovis, New Mexico. That she did board a bus of the defendant bus line pursuant thereto.

III.

That at approximately 6 p.m. of said day at a point approximately 15 miles from Las Cruces, New Mexico, in the direction of Deming, the driver of said bus, the agent of the defendant bus line, did negligently drive said bus into another automobile, the owner and occupants of which are unknown to the plaintiff.

IV.

That in said collision and as a direct and proximate result of said negligence upon the part of the defendant, two of the plaintiff's teeth were knocked out, her back and spinal column painfully injured and she was otherwise bruised and shaken.

V.

That the injuries so sustained by the plaintiff are severe and permanent and she has suffered severe and great pain and anguish therefrom and will continue so to suffer in the future. That she incurred and will incur expenses as a result of said injuries for medical care in excess of One Thousand (\$1,000.00) Dollars. That, also as a result of said

injuries, the plaintiff has been incapacitated from carrying on her household duties and has been forced to employ help to perform the same.

VI.

That as a result of said collision and the negligence of the defendant, certain of the plaintiff's personal belongings and luggage were lost. That these belongings were of the value of Fifty (\$50.00) Dollars.

Wherefore, plaintiff demands judgment against the defendant in the sum of Ten Thousand and Fifty (\$10,050.00) Dollars, and for her costs incurred herein.

WILLIAM G. HALL,
HAMILTON R. CATLIN,
JOHN F. MOLLOY,

By /s/ WM. G. HALL,
Attorneys for Plaintiff.

[Endorsed]: Filed June 5, 1947.

[Title of Superior Court and Cause No. 28681.]

State of Arizona,
County of Pima—ss.

I, Belle D. Hall, Clerk of the Superior Court of the State of Arizona, in and for the County of Pima, do hereby certify the above and foregoing to be a full, true and correct copy of the record, and the whole thereof in the above-entitled suit, heretofore pending in said Superior Court, being a suit numbered 28681, wherein Bertha Lucille Rhodes is plaintiff, and Pacific Greyhound Lines, a corporation, is defendant, said record consisting of the following:

1. Complaint, filed June 5, 1947;
2. Summons, and return thereon, filed June 10, 1947;
3. Affidavit of Service by Mail, filed June 24, 1947;
4. Notice of Petition for Removal, filed June 24, 1947;
5. Petition for Removal of Cause to the United States District Court, for the District of Arizona, filed June 24, 1947;
6. Bond for Removal, filed June 24, 1947;
7. Order for Removal, filed June 24, 1947;
8. Minute Entry.

In Testimony Whereof, I have hereunto set my hand and seal of said Superior Court, this 28th day of June, 1947.

/s/ BELLE D. HALL,

Clerk of the Superior Court of the State of Arizona,
in and for the County of Pima.

[Title of Superior Court and Cause No. 28681.]

ORDER FOR REMOVAL

This Cause, coming on for hearing upon the petition of Pacific Greyhound Lines, a corporation, defendant in the above-entitled action, for an order removing this cause to the District Court of the United States for the District of Arizona; and it appearing to this Court that the said defendant has filed his petition for such removal in due form and within the time required, and that said defendant has, with said petition, filed a bond for removal, duly conditioned as provided by law; and it appearing to the Court that the notice required by law of the filing of said bond and petition had, prior to the

fling thereof, been served upon the plaintiff herein, which said notice the Court finds was sufficient and in accordance with the requirements of the statute; and it appearing to this Court that this is a proper cause for removal to the said United States District Court for the District of Arizona;

This Court does hereby accept and approve said bond and said petition as good and sufficient and does order that this cause be, and the same is hereby removed to the District Court of the United States for the District of Arizona, and that no further proceedings be had in this cause in this Court, and the Clerk is hereby directed to make up the record in said cause for transmission to said District Court of the United States.

Dated this 24th day of June, 1947.

J. MERCER JOHNSON,
Judge.

[Endorsed]: Filed June 24, 1947.

In the District Court of the United States
for the District of Arizona

No. Civ. 426 Tucson

BERTHA LUCILLE RHODES,

Plaintiff,

vs.

PACIFIC GREYHOUND LINES, a Corporation,
Defendant.

ANSWER

Now Comes the defendant, Pacific Greyhound Lines, a corporation, by its attorneys, and answering plaintiff's complaint filed herein:

For a First Defense

I.

Answering Paragraph I of the Complaint filed herein, defendant admits the truth of the averments therein contained.

II.

Answering Paragraph II of the Complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments therein contained, and requires strict proof thereof.

III.

Answering Paragraph III of the Complaint, defendant denies generally and specifically each and every allegation therein contained.

IV.

Answering Paragraph IV of the Complaint, de-

defendant denies generally and specifically, each and every allegation therein contained.

V.

Answering Paragraph V of the Complaint, defendant denies generally and specifically each and every allegation therein contained.

VI.

Answering Paragraph VI of the Complaint, defendant denies generally and specifically each and every allegation therein contained.

For a Second Defense

For a Second Defense to plaintiff's Complaint, defendant alleges as follows:

That at the time and place of the accident and collision set forth in plaintiff's complaint, an emergency arose and confronted the driver of defendant's passenger bus and the said driver was placed in the position of and suddenly confronted by imminent peril in that while said driver was in a careful manner operating the bus containing passengers on the highway about 10 miles West of Las Cruces, New Mexico, and was proceeding in an easterly direction, the driver of an automobile which was not owned or controlled by the defendant, and which was proceeding westerly on said highway, approaching the bus, negligently, carelessly, suddenly and abruptly and without any signal or warning whatsoever, turned his said automobile from his right hand side of the highway to his left hand side of the highway and immediately in front of the bus and caused his said auto-

mobile to collide head-on with said bus; that the driver of said bus was then and there met with a sudden and immediate emergency and was suddenly and abruptly confronted with imminent peril endangering the lives and safety of the passengers in said bus, and said driver in said emergency, used his best judgment under the circumstances and used and exercised his best efforts to avoid the collision and to avoid injury to the said passengers and to others, and said emergency did not arise by and was not caused by the fault or negligence of the said driver or of the said defendant, or of any of defendant's agents or employees.

Wherefore, defendant prays that plaintiff take nothing by her complaint, and that defendant recover its costs and expenses in this case expended or incurred.

BAKER & WHITNEY.

By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed July 11, 1947.

In the District Court of the United States
for the District of Arizona

No. Civ. 67—Globe

GEORGE RUMEH,

Plaintiff,

vs.

PACIFIC GREYHOUND LINES, a Corporation,
Defendant.

No. Civ. 426—Tucson

BERTHA LUCILLE RHODES,

Plaintiff,

vs.

PACIFIC GREYHOUND LINES, a Corporation,
Defendant.

MOTION TO CONSOLIDATE CAUSES

Now Comes Pacific Greyhound Lines, defendant above named, by its attorneys, and moves the Court for an order consolidating the above actions for trial upon the ground and for the reason that the said actions arose out of the same accident and involved common questions of law and fact; the only difference between the actions being the parties plaintiff.

The said Cause No. Civ. 67—Globe, George Rumeh vs. Pacific Greyhound Lines, has been transferred to Tucson, and has been set for trial at Tucson on September 16, 1947; we therefore move that Cause No. Civ. 426—Tucson, Bertha Lucille Rhodes vs. Pacific Greyhound Lines, be consoli-

dated with said Rumeh case and be set for trial at the same time.

We submit this motion upon Statement of Points and Authorities pursuant to Rule 9, Rules of Practice of the United States District Court for the District of Arizona.

Dated at Phoenix, Arizona, this 22nd day of July, 1947.

BAKER & WHITNEY.

By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

STATEMENT OF POINTS AND AUTHORITIES

Rule 42 of Rules of Civil Procedure for the District Courts of the United States, provides as follows:

“(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

The above numbered and captioned causes arose by reason of and out of the same accident—an automobile collided with a bus of the defendant's in which the plaintiffs were passengers. The questions of law and fact in the two causes are identical. To separately try these actions would only result in

a great added expense to the defendant and a duplication of testimony.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed July 24, 1947.

[Title of District Court and Cause.]

MOTION FOR CONTINUANCE OF TRIAL

Now Comes the defendant above named by and through its attorneys, and moves the Court to postpone and continue the trial of the above causes for a reasonable time upon the ground and for the reason that there is a want of testimony in behalf of the defendant in that the defendant is unable to have present at the trial or to take the deposition of a material witness, a Mr. Alec C. Hood, whose permanent residence is 170 Greening Avenue, Las Cruces, New Mexico. That the testimony of such witness is material to the defense of the above causes and that the defendant has used due and proper diligence to procure such testimony and the testimony cannot be obtained from any other source. The postponement is not sought for delay only but that justice may be done.

The materiality of the evidence and the diligence exercised by the defendant is shown by the affidavit hereunto attached, marked Exhibit "A" and made a part hereof.

Dated at Phoenix, Arizona, this 27th day of October, 1948.

BAKER & WHITNEY.

By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

[Title of District Court and Cause.]

AFFIDAVIT

State of Arizona,
County of Maricopa—ss.

Alexander B. Baker, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant above named and makes this Affidavit for and on behalf of said defendant.

That the accident causing the injuries complained of in the Complaints filed in the above causes occurred on or about the 25th day of March, 1946, in the State of New Mexico. That the cases have been pending for a long period of time and any and all delays in trials have not been due to any fault on the part of the defendant. That on or about the 6th day of October, 1948, this affiant was first informed that the trial of the above cases would be had on November 1, 1948, in Tucson. That he immediately instituted investigation to determine the whereabouts of all material witnesses, including one Alec C. Hood. That affiant caused Subpoena to be issued to said Alec C. Hood and caused investigators to immediately try to contact him at his home in Las Cruces, New Mexico. That such investigators informed affiant that Witness Hood was in the State of Maine, but was expected to return to New Mexico in time for the trial. On yesterday, October 26, 1948, affiant was informed for the first time that said witness Alec C. Hood would not return to Arizona or New Mexico until Janu-

ary, 1949, and that at the present time he is in the State of Maine. That defendant has no means or process to procure the presence of said witness at the trial on November 1, and does not have sufficient time to take his deposition. That affiant is definitely assured that such witness will return to this jurisdiction in January or February, 1949.

That if said Alec C. Hood was called to testify as a witness in this case he would testify substantially as follows:

“My name is Alec C. Hood. I live at 170 Greening Ave., Las Cruces, New Mexico. I own and operate the Motor Service Garage in Las Cruces. On March 25th, 1946, at about 6:30 p.m., I received a telephone call from State Police to bring my wrecker to point 9 miles West of Las Cruces, on U. S. Highway No. 80 to the scene of an accident. I reached point of accident at about 6:50 p.m. It was still daylight and weather was clear. I first saw a Pacific Greyhound bus standing with left wheel about 8 feet south of south edge of black top pavement. The bus was headed due East and was parallel with highway. I saw that front end of bus was resting on top of a car later identified as being a Ford Coupe. The car was at a slight angle to the Southwest and right front of car was under front of bus and I could not raise bus with wrecker to get car out from under the bus. There were three occupants in Ford, a soldier and wife and a child about 7 or 8 years of age. The Highway Patrolman, Captain Salas, told me that all

occupants of Ford were dead. I examined tracks made by wheels of bus as it left the pavement on South side. I would estimate that the bus had left the pavement a distance of about 70 feet before it stopped. There were parts of Ford a distance I would estimate to be about $\frac{1}{2}$ length of bus to the rear and west, and I would assume that point of impact was where parts were found. There were no tracks or marks to indicate why Ford car apparently headed West was over on South shoulder of highway. The entire front end of the bus was out. The injured passengers from bus had all been taken to hospital when I reached the scene of the accident. A large truck with boom was used to lift up bus so that car could be pulled out.

ALEC C. HOOD."

That such testimony is material and essential to the proper defense of the above cases and cannot be obtained from any other source. That defendant has exercised every effort to obtain the presence of such witness at the trial and has used due diligence in that respect. The postponement of the trial is not sought for delay only but that justice may be done.

/s/ ALEXANDER B. BAKER.

Subscribed and sworn to before me this 27th day of October, 1948.

[Seal] /s/ DARRELL R. PARKER,
Notary Public.

My Commission Expires: April 27, 1949.

NOTICE

To: George Rumeh and Bertha Lucille Rhodes, plaintiffs above named, and David J. Smith, and Krucker & Fowler, attorneys for plaintiff Rumeh; and Messrs. William G. Hall, Hamilton R. Catlin and John F. Molloy, attorneys for plaintiff Bertha Lucille Rhodes.

You Are Hereby Notified that the foregoing Motion for Continuance will be urged before the Court on Monday, November 1, 1948, at the hour of 10:00 o'clock a.m., or as soon thereafter as Counsel may be heard.

Dated at Phoenix, Arizona, this 27th day of October, 1948.

BAKER & WHITNEY.

By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Oct. 28, 1948.

[Title of District Court and Cause No. 67.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, George Rumeh, and assess his damages at \$21,000.00.

/s/ F. W. HANNAH,
Foreman.

[Endorsed]: Filed Nov. 4, 1948.

[Title of District Court and Cause No. 426.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, Bertha Lucille Rhodes, and assess her damages at \$11,000.00.

/s/ F. W. HANNAH,
Foreman.

[Endorsed]: Filed Nov. 4, 1948.

[Title of District Court and Cause No. 67.]

MOTION FOR JUDGMENT FOR DEFENDANT NOTWITHSTANDING THE VERDICT AND FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VER- DICT; AND ALTERNATIVE MOTION FOR NEW TRIAL

Now Comes the defendant, by its attorneys, and pursuant to Rules 50 and 59, Rules of Civil Procedure for the District Courts of the United States, moves the Court for an order setting aside and vacating verdict and judgment rendered and entered in the above-captioned and numbered cause in favor of the plaintiff and directing the rendition and entry of judgment in favor of the defendant in accordance with the motion for directed verdict; and, in the alternative, for an order granting the defendant a new trial, for the following reasons and upon the following grounds:

I.

GROUND'S FOR JUDGMENT NOTWITH-
STANDING THE VERDICT

1. The Court erred in denying defendant's motion for an instructed verdict in favor of the defendant made at the close of all the evidence and the Court should have granted such motion and should have directed the jury to return a verdict in favor of the defendant and the court should now render and enter judgment in favor of the defendant in accordance with motion for directed verdict and notwithstanding the verdict in favor of the plaintiffs.

2. The evidence is insufficient to sustain a cause of action in favor of the plaintiff and is insufficient to support the verdict or the judgment rendered in accordance with the verdict, and the verdict and the judgment are not justified by the evidence and are contrary to the evidence and the law.

II.

GROUND'S FOR NEW TRIAL

1. The Court erred in denying defendant's motion for an instructed verdict in favor of the defendant made at the close of the plaintiff's evidence.

2. That the Court erred in denying defendant's motion for an instructed verdict made at the close of all the evidence.

3. The evidence is insufficient to sustain a cause of action in favor of the plaintiff and is insuffi-

cient to support the verdict or judgment and the verdict and judgment are not justified by the evidence and are contrary to the evidence and to the law.

4. That the damages awarded plaintiff are excessive and appear to have been given under the influence of passion or prejudice.

5. That the verdict of the jury was influenced by passion or prejudice.

Wherefore, defendant prays that the verdict of the jury herein and the judgment rendered and entered thereon be set aside and vacated and a judgment be rendered and entered herein in favor of the defendant in accordance with Motion for Directed Verdict notwithstanding the Verdict, in favor of the plaintiff; and in the alternative, that the Court set aside said verdict and judgment in favor of the plaintiff and grant the defendant a new trial herein.

Dated at Phoenix, Arizona, this 13th day of November, 1948.

BAKER & WHITNEY,
By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

NOTICE OF HEARING MOTIONS

To the Clerk of the above-entitled Court, and to the plaintiff above named and his attorneys:

You Are Hereby Notified that the defendant requests oral argument of the Motions hereto attached and will make such oral argument before the Court

on Monday, the 22nd day of November, 1948, at the regular hearing of the motion calendar, or as soon thereafter as counsel can be heard.

Dated this 13th day of November, 1948.

BAKER & WHITNEY,
By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Nov. 15, 1948.

[Title of District Court and Cause No. 426]

MOTION FOR JUDGMENT FOR DEFEND-
ANT NOTWITHSTANDING THE VERDICT
AND FOR JUDGMENT IN ACCORDANCE
WITH MOTION FOR DIRECTED VER-
DICT; AND ALTERNATIVE MOTION FOR
NEW TRIAL

Now Comes the defendant, by its attorneys, and pursuant to Rules 50 and 59, Rules of Civil Procedure for the District Courts of the United States, moves the Court for an order setting aside and vacating verdict and judgment rendered and entered in the above captioned and numbered cause in favor of the plaintiff and directing the rendition and entry of judgment in favor of the defendant in accordance with the motion for directed verdict; and, in the alternative, for an order granting the defendant a new trial, for the following reasons and upon the following grounds:

I.

GROUNDS FOR JUDGMENT NOTWITH-
STANDING THE VERDICT

1. The Court erred in denying defendant's motion for an instructed verdict in favor of the defendant made at the close of all the evidence and the Court should have granted such motion and should have directed the jury to return a verdict in favor of the defendant and the court should now render and enter judgment in favor of the defendant in accordance with motion for directed verdict and notwithstanding the verdict in favor of the plaintiff.

2. The evidence is insufficient to sustain a cause of action in favor of the plaintiff and is insufficient to support the verdict or the judgment rendered in accordance with the verdict, and the verdict and the judgment are not justified by the evidence and are contrary to the evidence and the law.

II.

GROUNDS FOR NEW TRIAL

1. The Court erred in denying defendant's motion for an instructed verdict in favor of the defendant made at the close of the plaintiff's evidence.

2. That the Court erred in denying defendant's motion for an instructed verdict made at the close of all the evidence.

3. The evidence is insufficient to sustain a cause of action in favor of the plaintiff and is insufficient

to support the verdict or judgment and the verdict and judgment are not justified by the evidence and are contrary to the evidence and to the law.

4. That the damages awarded plaintiff are excessive and appear to have been given under the influence of passion or prejudice.

5. That the verdict of the jury was influenced by passion or prejudice.

Wherefore, defendant prays that the verdict of the jury herein and the judgment rendered and entered thereon be set aside and vacated and a judgment be rendered and entered herein in favor of the defendant in accordance with Motion for Directed Verdict Notwithstanding the Verdict, in favor of the plaintiff; and in the alternative, that the Court set aside said verdict and judgment in favor of the plaintiff and grant the defendant a new trial herein.

Dated at Phoenix, Arizona, this 13th day of November, 1948.

BAKER & WHITNEY,
By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

NOTICE OF HEARING MOTIONS

To the Clerk of the above-entitled Court, and to the plaintiff above named and her attorneys:

You Are Hereby Notified that the defendant requests oral argument of the Motions hereto attached and will make such oral argument before the Court on Monday, the 22nd day of November, 1948, at

the regular hearing of the motion calendar, or as soon thereafter as counsel can be heard.

Dated this 13th day of November, 1948.

BAKER & WHITNEY.

By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Nov. 15, 1948.

[Title of District Court and Causes Nos. 67-426.]

STIPULATION

It Is Hereby Stipulated by and between attorneys for plaintiffs and defendant above named that Defendant's Motions for Judgment Notwithstanding the Verdicts and Motion for New Trial in each and both of the above cases shall be and are hereby submitted to the Court upon briefs and memoranda and shall be and are hereby deemed taken under advisement by the Court. The defendant has already submitted Memorandum of Points and Authorities in support of its Motions, but it is hereby granted the period of fifteen days from this date to submit additional memoranda. The plaintiffs shall have fifteen days thereafter within which to submit answering briefs or memoranda and the defendant shall have ten days thereafter within which to reply to the same. It is further stipulated and agreed that the

Court may render its order upon said motions from the State of California.

Dated this 2nd day of December, 1948.

DAVID J. SMITH,

KRUCKER & FOWLER,

By /s/ SAMUEL H. FOWLER,

Attorneys for Plaintiff Rumeh.

HALL, CATLIN & MOLLOY,

By /s/ WILLIAM G. HALL,

Attorneys for Plaintiff Rhodes.

BAKER & WHITNEY,

By /s/ ALEXANDER B. BAKER,

Attorneys for Defendant.

[Endorsed]: Filed Dec. 8, 1948.

In the District Court of the United States
for the District of Arizona

No. Civ. 67—Globe

GEORGE RUMEH,

Plaintiff,

vs.

PACIFIC GREYHOUND LINES, a corporation,
Defendant.

ORDER DENYING MOTIONS

The plaintiff above named brought his action against the above-named defendant for damages for personal injuries alleged to have been sustained by him in a collision between defendant's bus, in which

he was then riding as a paid passenger, and another motor vehicle, on a public highway in the vicinity of Las Cruces, New Mexico, on or about March 25, 1946, which collision was alleged to have been caused by the defendant's negligent operation of said bus.

Another plaintiff, Bertha Lucille Rhodes, also a passenger in the same bus, brought her separate action in cause No. Civ. 426-Tucson, for damages for personal injuries alleged to have been similarly sustained by her in said collision.

The respective causes of action having arisen out of the same accident, and the defendant being the same in each case, the actions were consolidated for trial and were tried together to a jury.

The jury rendered a separate verdict in each case, in favor of each plaintiff and against said defendant and judgment was entered thereon in each case, to-wit, in the sum of \$11,000.00 in favor of Bertha Lucille Rhodes, and in the sum of \$21,000.00 in favor of George Rumeh.

The defendant in the above-entitled cause has filed a motion to set aside and vacate the verdict and judgment above mentioned in favor of George Rumeh and against said defendant and that judgment be rendered and entered herein in favor of defendant in accordance with defendant's motion for a directed verdict notwithstanding the verdict in favor of the plaintiff; and in the alternative that the court set aside the verdict and judgment and grant a new trial to defendant.

Similar motions have been filed in the case of Ber-

tha Lucille Rhodes, vs. Pacific Greyhound Lines by said defendant.

Separate similar rulings are made by the court in each case.

The defendant as to its grounds for said motion for judgment notwithstanding the verdict sets out that the evidence is insufficient to sustain plaintiff's cause of action and to support said verdict or the judgment, and the verdict and judgment are not justified by the evidence and are contrary to the evidence and the law.

In the defendant's alternative motion for a new trial, the defendant, in addition to the above grounds, sets out that the court erred in denying defendant's motion for an instructed verdict made at the close of all of the evidence; that the damages awarded plaintiff are excessive and appear to have been given under the influence of passion or prejudice.

Though counsel for all parties have been most industrious in their presentation of briefs and data relating to the motions herein considered, we find but little new or additional therein which was not argued during the trial of the case.

A qualified jury heard the evidence from the lips of several witnesses who testified in the case, and we will not attempt here to analyze such evidence.

We conclude now, as we concluded at the trial that there was ample evidence to go to the jury on the question of the negligence of the defendant and on all other issues of the case.

In our opinion the evidence was sufficient to sustain the verdict and judgment herein and such ver-

dict and judgment are justified by the evidence; the verdict rendered herein was not excessive nor given under the influence of passion or prejudice.

All of the motions of the defendant are hereby denied.

Dated this 2nd day of March, 1949.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed March 7, 1949.

In the District Court of the United States
for the District of Arizona

No. Civ. 426—Tucson

BERTHA LUCILLE RHODES,

Plaintiff,

vs.

PACIFIC GREYHOUND LINES, a corporation,
Defendant.

ORDER DENYING MOTIONS

The plaintiff above named brought her action against the above-named defendant for damages for personal injuries alleged to have been sustained by her in a collision between defendant's bus, in which she was then riding as a paid passenger, and another motor vehicle, on a public highway in the vicinity of Las Cruces, New Mexico, on or about March 25, 1946, which collision was alleged to have been caused by the defendant's negligent operation of said bus.

Another plaintiff, George Rumeh, also a passenger

in the same bus, brought his separate action in cause No. Civ. 67, Globe, for damages for personal injuries alleged to have been similarly sustained by him in said collision.

The respective causes of action having arisen out of the same accident, and the defendant being the same in each case, the actions were consolidated for trial and were tried together to a jury.

The jury rendered a separate verdict in each case, in favor of each plaintiff and against said defendant and judgment was entered thereon in each case, to-wit, in the sum of \$11,000.00 in favor of Bertha Lucille Rhodes, and in the sum of \$21,000.00 in favor of George Rumeh.

The defendant in the above-entitled cause has filed a motion to set aside and vacate the verdict and judgment above mentioned in favor of Bertha Lucille Rhodes and against said defendant and that judgment be rendered and entered herein in favor of defendant in accordance with defendant's motion for a directed verdict notwithstanding the verdict in favor of the plaintiff; and in the alternative that the court set aside the verdict and judgment and grant a new trial to defendant.

Similar motions have been filed in the case of George Rumeh vs. Pacific Greyhound Lines by said defendant.

Separate similar rulings are made by the Court in each case.

The defendant as to its grounds for said motion for judgment notwithstanding the verdict sets out that the evidence is insufficient to sustain plaintiff's cause of action and to support said verdict or the judgment, and that the verdict and judgment are not justified by the evidence and are contrary to the evidence and the law.

In the defendant's alternative motion for a new trial, the defendant, in addition to the above grounds, sets out that the court erred in denying defendant's motion for an instructed verdict made at the close of all of the evidence; that the damages awarded plaintiff are excessive and appear to have been given under the influence of passion or prejudice.

Though counsel for all parties have been most industrious in their presentation of briefs and data relating to the motions herein considered, we find but little new or additional therein which was not argued during the trial of this case.

A qualified jury heard the evidence from the lips of several witnesses who testified in the case, and we will not attempt here to analyze such evidence.

We conclude now, as we concluded at the trial that there was ample evidence to go to the jury on the question of the negligence of the defendant and on all other issues of the case.

In our opinion the evidence was sufficient to sustain the verdict and judgment herein and such verdict and judgment are justified by the evidence; the

verdict rendered herein was not excessive nor given under the influence of passion or prejudice.

All of the motions of the defendant are hereby denied.

Dated this 2nd day of March, 1949.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed March 7, 1949.

[Title of District Court and Cause No. 67.]

SUPERSEDEAS AND COST BOND

Know All Men by These Presents:

That we, Pacific Greyhound Lines, a corporation, defendant above named, as principal, and Indemnity Insurance Company of North America, a Pennsylvania corporation, as surety, are held and firmly bound unto George Rumeh, plaintiff above named, in the full and just sum of Twenty-five Thousand (\$25,000.00) Dollars, to be paid to the said George Rumeh, his certain attorneys, heirs, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of March, 1949.

Whereas, lately in the District Court of the United States for the District of Arizona, in a suit depending in said court, between George Rumeh, as plaintiff, and Pacific Greyhound Lines, a corporation, as defendant, a judgment was rendered and entered in

favor of said plaintiff and against the said defendant, Pacific Greyhound Lines, and thereafter said court did render and enter an order denying said defendant's "Motion for Judgment for Defendant Notwithstanding the Verdict and for Judgment in Accordance with Motion for Directed Verdict; and Alternative Motion for New Trial"; and the said defendant, Pacific Greyhound Lines, having filed in said Court a notice of Appeal to the United States Court of Appeals for the Ninth Circuit from said judgment and order.

Now, the condition of the above obligation is such that if the said Pacific Greyhound Lines, defendant above named, shall prosecute its said appeal to effect and satisfy said judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or the judgment affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages the appellate court may award if the judgment be modified, then the above obligation to be void; otherwise to remain in full force and effect.

(Seal) PACIFIC GREYHOUND LINES,
a corporation,

By /s/ DAVID GRANT,
Secretary, Principal.

(Seal) INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA, a Pennsylvania
corporation,

By /s/ ALLEN LUHN,
Attorney-in-Fact, Surety.

State of California,
County of San Francisco—ss.

On this 25th day of March, in the year one thousand nine hundred and forty-nine, before me, Abraham Greenbaum, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly, commissioned and sworn, personally appeared David Grant known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the City and County of San Francisco the day and year in this certificate first above written.

(Seal) /s/ ABRAHAM GREENBAUM,
Notary Public in and for the City and County of San
Francisco, State of California.

My Commission Expires December 15, 1952.

The foregoing bond and surety approved, and when filed it shall operate as a supersedeas.

/s/ DAVID W. LING.
United States District Judge.

[Endorsed]: Filed March 29, 1949.

[Title of District Court and Cause No. 426.]

SUPERSEDEAS AND COST BOND

Know All Men by These Presents:

That we, Pacific Greyhound Lines, a corporation, defendant above named, as principal, and Indemnity Insurance Company of North America, a Pennsylvania corporation, as surety, are held and firmly bound unto Bertha Lucille Rhodes, plaintiff above named, in the full and just sum of Fifteen Thousand (\$15,000.00) Dollars, to be paid to the said Bertha Lucille Rhodes, her certain attorneys, heirs, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of March, 1949.

Whereas, lately in the District Court of the United States for the District of Arizona, in a suit depending in said court, between Bertha Lucille Rhodes, as plaintiff, and Pacific Greyhound Lines, a corporation, as defendant, a judgment was rendered and entered in favor of said plaintiff and against the said defendant, Pacific Greyhound Lines, and thereafter said court did render and enter an order denying said defendant's "Motion for Judgment for Defendant Notwithstanding the Verdict and for Judgment in Accordance with Motion for Directed Verdict; and Alternative Motion for New Trial"; and the said defendant, Pacific Greyhound Lines, having filed in said Court a notice of Appeal to the United States

Court of Appeals for the Ninth Circuit from said judgment and order.

Now, the condition of the above obligation is such that if the said Pacific Greyhound Lines, defendant above named, shall prosecute its said appeal to effect and satisfy said judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or the judgment affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages the appellate court may award if the judgment be modified, then the above obligation to be void; otherwise to remain in full force and effect.

(Seal) PACIFIC GREYHOUND LINES,
a corporation,

By /s/ DAVID GRANT,
Secretary, Principal.

(Seal) INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA, a Pennsylvania
corporation,

By /s/ ALLEN LUHN,
Attorney-in-Fact, Surety.

State of California,
County of San Francisco—ss.

On this 25th day of March, in the year one thousand nine hundred and forty-nine, before me, Abraham Greenbaum, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared David Grant, known to me to be

the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the City and County of San Francisco the day and year in this certificate first above written.

(Seal) /s/ ABRAHAM GREENBAUM,
Notary Public in and for the City and County of San
Francisco, State of California.

My Commission Expires December 15, 1952.

The foregoing bond and surety approved, and when filed it shall operate as a supersedeas.

/s/ DAVID W. LING,
United States District Judge.

[Endorsed]: Filed March 29, 1949.

[Title of District Court and Cause No. 67.]

NOTICE OF APPEAL

Notice Is Hereby Given that Pacific Greyhound Lines, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on or about the 4th day of November, 1948, and from the order denying defendant's "Motion for Judgment for Defendant Notwithstanding the Verdict and for Judgment in Accordance with Motion for Directed Verdict; and Alternative Motion for New Trial" entered in this action on or

about the 7th day of March, 1949, and from the whole and all of said judgment and order.

Dated at Phoenix, Arizona, this 30th day of March, 1949.

BAKER & WHITNEY,

By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

[Endorsed]: Filed March 31, 1949.

[Title of District Court and Cause No. 426.]

NOTICE OF APPEAL

Notice Is Hereby Given that Pacific Greyhound Lines, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on or about the 4th day of November, 1948, and from the order denying defendant's "Motion for Judgment for Defendant Notwithstanding the Verdict and for Judgment in Accordance with Motion for Directed Verdict; and Alternative Motion for New Trial" entered in this action on or about the 7th day of March, 1949, and from the whole and all of said judgment and order.

Dated at Phoenix, Arizona, this 30th day of March, 1949.

BAKER & WHITNEY,

By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

[Endorsed]: Filed March 31, 1949.

[Title of District Court and Causes Nos. 67-426.]

DESIGNATION OF RECORD AND PROCEED-
INGS TO BE CONTAINED IN RECORD ON
APPEAL

To: Wm. H. Loveless, Clerk of the above Court, and
Messrs. David J. Smith, A. L. Carlton, and
Krucker & Fowler, attorneys for plaintiff George
Rumeh, and Messrs. Hall, Catlin & Molloy, At-
torneys for plaintiff, Bertha Lucille Rhodes:

Now Comes Pacific Greyhound Lines, a corpora-
tion, defendant above named, by its attorneys, and
designates the following records and proceedings in
the above causes to be contained in the record on ap-
peal:

All pleadings, evidence, depositions, testimony, ex-
hibits, minutes, documents, papers, records and pro-
ceedings filed or had in the above actions, including
this designation and all notices, orders, papers and
proceedings hereinafter entered, filed or had in these
actions in this court.

There is filed herewith two copies of the Reporter's
Transcript of the Evidence.

Dated at Phoenix, Arizona, this 31st day of March,
1949.

BAKER & WHITNEY,

By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed April 1, 1949.

[Title of District Court and Causes Nos. 67-426.]

STIPULATION FOR CONSOLIDATION
OF RECORD

It Is Hereby Stipulated and Agreed by and between attorneys for plaintiffs and defendant above named, that for the purposes of appeal, the records shall be consolidated, as they were consolidated for trial in the District Court, and it shall be necessary to file only one notice to the Clerk of papers and records required on appeal, and one copy of all other papers, notices and documents necessary to effect the appeal or complete the record, all of which shall be deemed filed in each of the above cases, and it shall be necessary for the Clerk of the said United States District Court to transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit only one record, which shall include all records, papers and proceedings of each of the above two cases, and the causes may be docketed in the said United States Court of Appeals as consolidated, and all proceedings thereafter in the said United States Court of Appeals shall be conducted as a consolidated cause.

Dated this 30th day of March, 1949.

DAVID J. SMITH,

A. L. CARLTON,

KRUCKER & FOWLER,

/s/ HERBERT Y. KRUCKER,

HALL, CATLIN & MOLLOY,

By /s/ WILLIAM G. HALL,

Attorneys for Plaintiffs, Bertha Lucille Rhodes and
George Rumeh.

BAKER & WHITNEY,
By /s/ ALEXANDER B. BAKER,
Attorneys for Defendant.

[Endorsed]: Filed April 4, 1949.

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF MONDAY, AUG. 4, 1947

(Globe Division)

May, 1947, Term. At Tucson.

Honorable Howard C. Speakman, United States
District Judge, Presiding.

[Title of Cause No. 67.]

Defendant's Motion to Consolidate this Cause with
Civ-426-Tucson comes on regularly for hearing.

Hamilton R. Catlin, Esquire, appears on behalf of
the plaintiff in Civ-426-Tucson. No appearance is
made by or on behalf of any other parties. Said coun-
sel for the plaintiff in Civ-426-Tucson states that the
plaintiff in said cause is acquiescent to defendant's
motion to consolidate this cause with Civ-426- Tuc-
son, and

It Is Ordered that this cause be consolidated with
Civ-426-Tucson and be and it is set for trial on Sep-
tember 16, 1947.

In the United States District Court
for the District of Arizona

MINUTE ENTRY OF MONDAY, AUG. 4, 1947
(Tucson Division)

May, 1947, Term. At Tucson.

Honorable Howard C. Speakman, United States
District Judge, Presiding.

[Title of Cause No. 426.]

Plaintiff's Motion for Trial Setting and Defendant's Motion to Consolidate this Cause with Cause No. Civil-67-Globe come on regularly for hearing this day.

Hamilton R. Catlin, Esquire, is present for the plaintiff. No appearance is made on behalf of the defendant.

Said counsel for the plaintiff states to the Court that plaintiff acquiesces to defendants Motion to Consolidate this Cause with Cause No. Civil-67-Globe; whereupon,

It Is Ordered that said Motion to Consolidate this Cause with Cause No. Civil-67-Globe be and it is granted, and

It Is Further Ordered that this case be set for trial September 16, 1947.

In the United States District Court for the
District of Arizona

MINUTE ENTRY OF MONDAY, NOV. 1, 1948

November, 1948, Term, at Tucson.

Honorable Jacob Weinberger, United States District Judge, Specially Assigned, Presiding.

[Title of Causes Nos. 67-426.]

These cases come on regularly for trial this day. William G. Hall, Esquire, and Samuel Fowler, Esquire, appear as counsel for the plaintiffs. Alex Baker, Esquire, appears as counsel for the defendant. On motion of Samuel Fowler, Esquire,

It Is Ordered that A. L. Carlton be entered as associate counsel for the plaintiffs.

Alex Weiss is present as official reporter.

Counsel for the plaintiffs announce ready for trial.

Counsel for the defendant now urges Defendant's Motion for Continuance heretofore filed.

Said Motion is resisted by counsel for the plaintiffs.

It Is Ordered that Defendant's Motion for Continuance be and it is denied.

And thereupon, at the hour of 11:05 o'clock a.m., It Is Ordered that the further trial of these cases be continued until 3:00 o'clock p.m., this date, to which time all jurors in attendance, the parties and counsel are excused.

Subsequently, at the hour of 3:00 o'clock p.m., all jurors, parties and their respective counsel be-

ing present pursuant to recess, further proceedings of trial are had as follows:

It Is Ordered that Defendants' Motion for continuance be and it is denied.

On stipulation of counsel, It Is Ordered that the record show that these cases are consolidated for trial.

A lawful jury of 12 persons is now duly empaneled and sworn to try these cases.

On stipulation of counsel, It Is Ordered that an alternate juror be empaneled herein and that each side may be allowed one peremptory challenge.

Thereupon, an alternate juror is now duly empaneled and sworn to try these cases.

It Is Ordered that the jurors not empaneled in the trial of these cases be and they are excused until further order.

Samuel Fowler, Esq., now reads the complaint in Civ-67 Globe, to the Jury and Alex Baker, Esq., now reads the answer thereto. William G. Hall, Esq., now reads the complaint in Civ-426 Tucson, to the Jury and Alex Baker, Esq., now reads the answer thereto.

A. L. Carlton, Esq., now makes the opening statement to the jury and Alex Baker, Esq., reserves his statement on behalf of the defendant.

Plaintiffs' Case

A. D. Long is now duly sworn and examined on behalf of the plaintiffs.

The following Plaintiffs' Exhibits are now admitted in evidence: 1. X-Ray; 2. X-Ray; 3. X-Ray.

And thereupon, at the hour of 5:10 o'clock p.m., It Is Ordered that the further trial of these cases be continued until 10:00 o'clock a.m., November 2, 1948, to which time the Jury being first duly admonished by the Court, the parties and counsel are excused.

In the United States District Court for the
District of Arizona

MINUTE ENTRY OF TUESDAY, NOV. 2, 1948

November, 1948, Term, at Tucson.

Honorable Jacob Weinberger, United States District Judge, Specially Assigned, Presiding.

[Title of Causes Nos. 67-426.]

The Jury and all members thereof, the parties and respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiffs' Case Continued:

Counsel for the plaintiffs now calls Cody Bach for cross-examination as an adverse party.

Counsel for the defendant objects, and said objection is sustained.

Viola B. Tuck is now duly sworn and examined on behalf of the plaintiffs.

Plaintiffs' Exhibit 4, Time Table, is now admitted in evidence.

The following Defendants' Exhibits are now admitted in evidence: Ex. B, Photograph; Ex. C, Photograph; Ex. D, Photograph; Ex. A, Photograph.

C. G. Salas is now duly sworn and examined on behalf of the plaintiffs.

Plaintiffs' Exhibit 5, Photograph, is now admitted in evidence.

Howard Jones is now duly sworn and examined on behalf of the plaintiffs.

And thereupon, at the hour of 12:10 o'clock p.m., It Is Ordered that the further trial of this case be continued until 1:45 o'clock p.m., to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of 1:45 o'clock p.m., the Jury and all members thereof, the parties and their respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiffs' Case Continued:

Howard Jones, heretofore sworn, is now recalled and further examined on behalf of the plaintiffs.

Dr. N. K. Thomas is now duly sworn and examined on behalf of the plaintiffs.

The following Plaintiffs' exhibits are now admitted in evidence: Ex. 6, X-Ray; Ex. 7, X-Ray; Ex. 8, X-Ray.

Dr. Albert L. Secrist is now duly sworn and examined on behalf of the plaintiffs.

Bertha Lucille Rhodes is now duly sworn and examined on behalf of the plaintiffs.

George Rumeh is now duly sworn and examined on behalf of the plaintiffs.

And thereupon, at the hour of 3:30 o'clock p.m., It Is Ordered that the further trial of these cases

be continued until 10:00 o'clock a.m., Wednesday, November 3, 1948, to which time the Jury being first duly admonished by the Court, the parties and counsel are excused.

In the United States District Court for the
District of Arizona

MINUTE ENTRY OF WEDNESDAY,
NOV. 3, 1948

November, 1948, Term, at Tucson.

Honorable Jacob Weinberger, United States District Judge, Specially Assigned, Presiding.

[Title of Causes Nos. 67-426.]

The Jury and all members thereof, the parties and respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

Plaintiffs' Case Continued:

Plaintiff, George Rumeh, heretofore sworn, is now recalled and further examined on behalf of the plaintiffs.

Howard Jones, heretofore sworn, is now recalled and further examined on behalf of the plaintiffs.

C. G. Salas, heretofore sworn, is now recalled and further examined on behalf of the plaintiffs.

Whereupon, the Plaintiffs rest.

At 11:05 o'clock a.m., the Jury being first duly admonished, is excused from the Court Room until further order.

Counsel for the defendant now moves Court to

direct a verdict in favor of the defendant in each of causes consolidated for trial, and states his grounds therefor. Said Motion is now duly argued by respective counsel.

It Is Ordered that defendant's Motion for a Directed Verdict be and it is denied, in each of these cases.

At 11:55 o'clock a.m., the jury is recalled and all members thereof are present. Counsel now stipulate that henceforth it will be sufficient only to remind the Jury of Court's admonition.

And thereupon, at the hour of 11:58 o'clock a.m., It Is Ordered that the further trial of this case be continued to 1:45 o'clock p.m., to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of 2:20 o'clock p.m., the jury and all members thereof, the parties and respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

Alex Baker, Esq., now states the defendant's case to the Jury.

Defendant's Case:

William M. Boone, Jr., is now duly sworn and examined on behalf of the defendant.

Cody Bach is now duly sworn and examined on behalf of the defendant.

Whereupon, the defendant rests.

Both sides rest.

At 3:25 o'clock p.m., the Jury being duly admonished, is now excluded from the Court Room.

Whereupon, the Court and counsel retire to Chambers, and the following proceedings are had, in the absence of the Jury:

Respective counsel state they have no objections to the Court's proposed instructions.

Said counsel for the defendant now renews Motion for a Directed Verdict on the same grounds as stated at the time original motion was made.

It Is Ordered that said Motion be and it is denied.

At 3:45 o'clock p.m., the Jury and all members, the parties and their respective counsel are present in open Court and further proceedings of trial are had as follows:

William G. Hall, Esquire, counsel for the plaintiff, Bertha Lucille Rhodes, now states to the Jury that the plaintiff has moved to amend the prayer of her complaint in Civ-426 Tucson, and that the approval of the Court on said amendment has been granted, and said prayer, as amended, is now read to the Jury by said counsel, as follows: "Wherefore plaintiff demands judgment against the defendant in the sum of \$25,050, and for her costs incurred herein."

All the evidence being in, the case is now argued by respective counsel to the Jury.

And thereupon, at the hour of 5:45 o'clock p.m.,

It Is Ordered that the further trial of these cases be continued until Thursday, November 4, 1948, at 10:00 o'clock a.m., to which time the Jury, being first duly admonished by the Court, the parties and counsel are excused.

In the United States District Court for the
District of Arizona

MINUTE ENTRY OF THURSDAY, NOV. 4, 1948

November, 1948, Term, at Tucson.

Honorable Jacob Weinberger, United States District Judge, Specially Assigned, Presiding.

[Title of Causes Nos. 67-426.]

The Jury and all members thereof, the parties and respective counsel being present pursuant to recess, further proceedings of trial are had as follows:

Whereupon, the Court duly instructs the Jury.

It Is Ordered that Lee Adamson, alternate juror, be and he is excused from further attendance in this case.

The Jury now retire at the hour of 10:28 o'clock a.m. in charge of a sworn bailiff to consider of their verdicts.

Subsequently, at the hour of 12:10 o'clock p.m., the Jury having so requested, It Is Ordered that the bailiff escort the Jury to lunch.

And subsequently, at 3:30 o'clock p.m., the Plain-

tiff, George RumeH, and all counsel being present, the Jury return in a body into Open Court and all members thereof being present are asked if they have agreed upon verdicts. Whereupon, the Foreman reports that they have agreed and presents the following verdicts, to-wit:

“GEORGE RUMEH,

Plaintiff,

Against

PACIFIC GREYHOUND LINES, a Corporation,
Defendant.

VERDICT—CIV-67 GLOBE

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, George RumeH, and assess his damages at \$21,000.00.

F. W. HANNAH,
Foreman.”

“BERTHA LUCILLE RHODES,

Plaintiff,

Against

PACIFIC GREYHOUND LINES, a Corporation,
Defendant.

VERDICT—CIV-426 TUCSON

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff, Bertha Lucille Rhodes, and assess her damages at \$11,000.00.

F. W. HANNAH,
Foreman.”

The verdicts are read as recorded, and no poll being desired by either side, It Is Ordered that the Jury be discharged from the further consideration of these cases.

Counsel for respective parties stipulate that the presence of the Court Reporter to take the verdicts and proceedings pertaining thereto is waived, the Court now approving said stipulation.

Whereupon, It Is Ordered that judgment be entered by the Clerk forthwith upon the verdicts as follows:

For the Plaintiff, George Rumeh, and against the defendant, Pacific Greyhound Lines, in the sum of \$21,000.00.

For the Plaintiff, Bertha Lucille Rhodes, and against the defendant, Pacific Greyhound Lines, in the sum of \$11,000.00.

It Is Ordered that the Jury be excused from further service in these cases and until further order.

In the United States District Court for the
District of Arizona

MINUTE ENTRY OF THURSDAY,
NOV. 18, 1948

October, 1948, Term, at Phoenix.

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Causes Nos. 67-426.]

It Is Ordered that Defendant's Motion for Judgment for Defendant notwithstanding the Verdict

and for Judgment in Accordance with Motion for Directed Verdict and Alternative Motion for New Trial, heretofore noticed for hearing Monday, November 22, 1948, be and it is continued for hearing until further order.

In the District Court of the United States for the
District of Arizona

MINUTE ENTRY OF MONDAY,
MARCH 8, 1949
(Globe Division)

November, 1948, Term, at Tucson.

Honorable Wm. H. Holly, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause No. 67.]

Alexander B. Baker, Esquire, is present for the defendant and represents that counsel have stipulated that in the absence of Judge Jacob Weinberger orders fixing supersedeas bond and staying execution of judgment herein may be made by Judge Holly, if he is agreeable thereto.

Whereupon, on motion of said counsel for defendant,

It Is Ordered that supersedeas bond herein be fixed in the sum of \$25,000.00, and It Is Further Ordered that execution of judgment be stayed for a period of thirty days.

In the District Court of the United States for the
District of Arizona

MINUTE ENTRY OF MONDAY,
MARCH 8, 1949
(Tucson Division)

November, 1948, Term, at Tucson.

Honorable Wm. H. Holly, U. S. District Judge,
Specially Assigned, Presiding.

[Title of Cause No. 426.]

Alexander B. Baker, Esquire, is present for the defendant and represents that counsel have stipulated that in the absence of Judge Jacob Weinberger order fixing supersedeas bond and staying execution of judgment herein may be made by Judge Holly, if he is agreeable thereto.

Whereupon, on motion of said counsel for defendant,

It Is Ordered that, supersedeas bond herein be fixed in the sum of \$15,000.00, and It Is Further Ordered that execution of judgment be stayed for a period of thirty days.

In the United States District Court for the
District of Arizona

CLERK'S CERTIFICATE

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of George Rumeh, Plaintiff, versus Pacific Greyhound Lines, a corporation, Defendant, numbered Civ-67 Globe, and in the case of Bertha Lucille Rhodes, Plaintiff, versus Pacific Greyhound Lines, a corporation, Defendant, numbered Civ-426 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said cases, and that the attached and foregoing copies of the civil docket entries and minutes are true and correct copies of the originals thereof remaining in my office.

I further certify that said original documents, and said copies of the civil docket entries and of the minute entries, constitute the entire record in said cases as designated by the appellant, and the same are as follows, to-wit:

1. Civil Docket Entries in Civ-67 Globe.
2. Civil Docket Entries in Civ-426 Tucson.

3. Complaint, filed October 24, 1946, in Civ-67 Globe.

4. Plaintiff's Praecipe for Summons, filed October 25, 1946, in Civ-67 Globe.

5. Summons, filed October 30, 1946, in Civ-67 Globe.

6. Defendant's Answer, filed November 19, 1946, in Civ-67 Globe.

7. Affidavit of Service of Answer, filed November 19, 1946, in Civ-67 Globe.

8. Plaintiff's Demand for Jury Trial, filed November 21, 1946, in Civ-67 Globe.

9. Plaintiff's Motion to Set, filed November 21, 1946, in Civ-67 Globe.

10. Record on Removal from Superior Court of Pima County, Arizona, filed July 8, 1947, in Civ-426 Tucson: (Complaint, Summons and Return, Affidavit of Service by Mail, Notice of Petition for Removal, Petition for Removal of Cause to U. S. Dist. Court, Bond for Removal, Order for Removal, Minute Entry, and Clerk's Certificate.)

11. Defendant's Answer, filed July 11, 1947, in Civ-426 Tucson.

12. Affidavit of Service by Mail of copy of Defendant's Answer on Opposing Counsel, filed July 11, 1947, in Civ-426 Tucson.

13. Motion for Trial Setting and Notice of Hearing on July 28, 1947, at 10:00 o'clock a.m., filed July 21, 1947, in Civ-426 Tucson.

14. Affidavit of Service of Copy of Motion for Trial Setting, etc., filed July 21, 1947, in Civ-426 Tucson.

15. Motion to Consolidate Causes, filed July 24, 1947, in Civ-67 Globe, and Civ-426 Tucson.

16. Affidavit of Service of Motion to Consolidate by Mail, filed July 24, 1947, in Civ-67 Globe and Civ-426 Tucson.

17. Plaintiff's Motion for Changing the Manner of Taking Deposition, filed August 15, 1947, in Civ-67 Globe and Civ-426 Tucson.

18. Affidavit of Service by Mail, filed August 15, 1947, in Civ-67 Globe and Civ-426 Tucson.

19. Defendant's Objection to Plaintiffs' Motion for Changing Manner of Taking Deposition, filed August 19, 1947, in Civ-67 Globe and Civ-426 Tucson.

20. Deposition of Alice B. Newell, filed September 8, 1947, in Civ-67 Globe and Civ-426 Tucson.

21. Notice of Filing of Deposition, filed September 10, 1947, in Civ-67 Globe and Civ-426 Tucson.

22. Praeceptum for Subpoenas Duces Tecum, filed December 29, 1947, in Civ-67 Globe and Civ-426 Tucson.

23. Notice of Taking Deposition of Viola Tuck, filed June 10, 1948, in Civ-67 Globe and Civ-426 Tucson.

24. Affidavit of Service by Mail of Notice of Taking Deposition, filed June 10, 1948, in Civ-67 Globe and Civ-426 Tucson.

25. Deposition of Viola Tuck, taken on behalf of plaintiffs, filed September 13, 1948, in Civ-67 Globe and Civ-426 Tucson.

26. Praeceptum for Subpoena Duces Tecum, filed October 16, 1948, in Civ-67 Globe and Civ-426 Tucson.

27. Praeipe for Subpoena, Wm. M. Boone, Jr., filed October 22, 1948, in Civ-67 Globe and Civ-426 Tucson.

28. Praeipe for Subpoena to Carlos Salas, filed October 22, 1948, in Civ-67 Globe and Civ-426 Tucson.

29. Notice of Filing Deposition of Viola Tuck, filed October 27, 1948, in Civ-67 Globe and Civ-426 Tucson.

30. Defendant's Motion for Continuance of Trial, filed October 28, 1948, in Civ-67 Globe and Civ-426 Tucson.

31. Affidavit of Service by Mail, filed October 28, 1948, in Civ-67 Globe and Civ-426 Tucson.

32. Subpoena Duces Tecum as to Captain Carlos Salas, filed November 1, 1948, in Civ-67 Globe and Civ-426 Tucson.

33. Subpoena as to Wm. M. Boone, Jr., filed November 1, 1948, in Civ-67 Globe and Civ-426 Tucson.

34. Praeipe for Subpoena to Frank Keefe, filed November 1, 1948, in Civ-67 Globe and Civ-426 Tucson.

35. Subpoena for Frank Keefe, filed November 1, 1948, in Civ-67 Globe and Civ-426 Tucson.

36. Jury List, filed November 1, 1948, in Civ-67 Globe and Civ-426 Tucson.

37. Verdict, filed November 4, 1948, in Civ-67 Globe.

38. Verdict, filed November 4, 1948, in Civ-426 Tucson.

39. Instructions to Jury, filed November 4, 1948, in Civ-67 Globe and Civ-426 Tucson.

40. Rejected Instructions, filed November 4, 1948, in Civ-67 Globe and Civ-426 Tucson.

41. Defendant's Memorandum of Costs and Disbursements, filed November 8, 1948, in Civ-67 Globe.

42. Affidavit of Service by Mail of Memo of Costs, etc., and Notice of Application for Assessment of Costs, filed November 8, 1948, in Civ-67 Globe.

43. Notice of Application for Assessment of Costs on November 12, 1948, at 10:00 o'clock a.m., filed November 8, 1948, in Civ-67 Globe.

44. Objections and Exceptions to Plaintiffs' Memo of Costs and Disburesemnts, filed November 10, 1948, in Civ-67 Globe.

45. Affidavit of Service by Mail, filed November 10, 1948, in Civ-67 Globe.

46. Plaintiffs' Amended Memorandum of Costs and Disbursements, filed November 13, 1948, in Civ-67 Globe.

47. Affidavit of Service by Mail of Amended Memorandum of Costs and Disbursements, dated November 13, 1948, in Civ-67 Globe.

48. Plaintiffs' Memorandum of Costs and Disbursements, filed November 9, 1948, in Civ-426 Tucson.

49. Notice of Application for Assessment of Costs on November 12, 1948, at 10:00 o'clock a.m., filed November 9, 1948, in Civ-426 Tucson.

50. Affidavit of Service by Mail of Memorandum of Costs, etc., and Notice of Application for

Assessment of Costs, filed November 9, 1948, in Civ-426 Tucson.

51. Defendant's Objections and Exceptions to Plaintiffs' Memorandum of Costs and Disbursements, filed November 12, 1948, in Civ-426 Tucson.

52. Affidavit of Service by Mail, filed November 12, 1948, in Civ-426 Tucson.

53. Motion for Judgment for Defendant Notwithstanding the Verdict and for Judgment in Accordance with Motion for Directed Verdict; and Alternative Motion for New Trial, filed November 15, 1948, in Civ-67 Globe.

54. Affidavit of Service by Mail, filed November 15, 1948, in Civ-67 Globe.

55. Motion for Judgment for Defendant Notwithstanding the Verdict and for Judgment in Accordance with Motion for Directed Verdict; and Alternative Motion for New Trial, filed November 15, 1948, in Civ-426 Tucson.

56. Affidavit of Service by Mail of Motion for Judgment for Defendant, etc., filed November 15, 1948, in Civ-426 Tucson.

57. Memo of Pts. and Auths. in Support of Motions, filed November 15, 1948, in Civ-67 Globe and Civ-426 Tucson.

58. Affidavit of Ser. by Mail of Memo. of Pts. & Auths., filed November 15, 1948, in Civ-67 Globe and Civ-426 Tucson.

59. Stipulation of Counsel that Defendant's Motions for Judgment Notwithstanding the Verdicts, etc., be submitted on briefs and memoranda, filed

December 8, 1948, in Civ-67 Globe and Civ-426 Tucson.

60. Supplemental Memo in Support of Defendant's Motions for Judgment for Defendant Notwithstanding the Verdict, filed December 18, 1948, in Civ-67 Globe and Civ-426 Tucson.

61. Affidavit of Service of Defendant's Supplemental Memorandum, filed December 18, 1948, in Civ-67 Globe and Civ-426 Tucson.

62. Plaintiff's Answering Brief on Defendant's Motion for Judgment for Defendant Notwithstanding the Verdict and for Judgment in accordance with Motion for Directed Verdict and Alternative Motion for New Trial, filed December 31, 1948, in Civ-67 Globe and Civ-426 Tucson.

63. Affidavit of Service by Mail, filed December 31, 1948, in Civ-67 Globe and Civ-426 Tucson.

64. Defendant's Reply Memorandum, filed January 11, 1949, in Civ-67 Globe and Civ-426 Tucson.

65. Affidavit of Service by Mail of Defendant's Reply Memorandum, filed January 11, 1949, in Civ-67 Globe and Civ-426 Tucson.

66. Order Denying Motion for Judgment for Defendant Notwithstanding the Verdict and for Judgment in accordance with Motion for Directed Verdict and Alternative Motion for New Trial signed at Los Angeles, March 2, 1949, filed March 7, 1949, in Civ-67 Globe.

67. Order Denying Motion for Judgment for Defendant Notwithstanding the Verdict and for Judgment in accordance with Motion for Directed Verdict and Alternative Motion for New Trial

signed at Los Angeles, March 2, 1949, filed March 7, 1949, in Civ-426 Tucson.

68. Supersedeas and Cost Bond filed at Phoenix 3/29/49, docketed March 30, 1949, in Civ-67 Globe (with Court's approval endorsed thereon).

69. Supersedeas and Cost Bond filed at Phoenix 3/29/49, docketed March 30, 1949, in Civ-426 Tucson (with Court's approval endorsed thereon).

70. Notice of Appeal, filed March 31, 1949, in Civ-67 Globe.

71. Notice of Appeal, filed March 31, 1949, in Civ-426 Tucson.

72. Designation of Record and Proceedings to Be Contained in Record on Appeal, filed April 1, 1949, in Civ-67 Globe and Civ-426 Tucson.

73. Affidavit of Service by Mail of Copy of Designation of Record, etc., filed April 1, 1949, in Civ-67 Globe and Civ-426 Tucson.

74. Reporter's Transcript of Evidence and Proceedings, filed April 1, 1949, in Civ-67 Globe and Civ-426 Tucson.

75. Stipulation for Consolidation of Record on Appeal in Civ-67 Globe and Civ-426 Tucson, filed April 4, 1949, in Civ-67 Globe and Civ-426 Tucson.

76. Plaintiffs' Exhibits Nos. 1, 2 and 3 (X-rays), 4 (Time Table), 5 (Photograph), 6, 7 and 8 (X-rays), filed in Civ-67 Globe and Civ-426 Tucson.

77. Defendant's Exhibits A, B, C and D (Photographs), filed in Civ-67 Globe and Civ-426 Tucson.

78. Minute Entry of August 4, 1947, in Civ-67 Globe.

79. Minute Entry of August 4, 1947, in Civ-426 Tucson.

80. Minute Entry of Sept. 4, 1947, in Civ-67 Globe.

81. Minute Entry of September 4, 1947, in Civ-426 Tucson.

82. Minute Entry of November 17, 1947, in Civ-67 Globe.

83. Minute Entry of November 17, 1947, in Civ-426 Tucson.

84. Minute Entry of December 29, 1947, in Civ-67 Globe.

85. Minute Entry of December 29, 1947, in Civ-426 Tucson.

86. Minute Entry of October 4, 1948, in Civ-67 Globe.

87. Minute Entry of October 4, 1948, in Civ-426 Tucson.

88. Minute Entry of November 1, 1948, in Civ-67 Globe and Civ-426 Tucson.

89. Minute Entry of November 2, 1948, in Civ-67 Globe and Civ-426 Tucson.

90. Minute Entry of November 3, 1948, in Civ-67 Globe and Civ-426 Tucson.

91. Minute Entry of November 4, 1948, in Civ-67 Globe and Civ-426-Tucson.

92. Minute Entry of November 18, 1948, in Civ-67 Globe and Civ-426 Tucson.

93. Minute Entry of March 8, 1949, in Civ-67 Globe.

94. Minute Entry of March 8, 1949, in Civ-426 Tucson.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$8.40 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 6th day of May, 1949.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

In the District Court of the United States
For the District of Arizona

Consolidated for Trial

No. Civ. 67—Globe

GEORGE RUMEH,

Plaintiff,

vs.

PACIFIC GREYHOUND LINES, a corporation,
Defendant.

No. Civ. 426—Tucson

BERTHA LUCILLE RHODES,

Plaintiff,

vs.

PACIFIC GREYHOUND LINES, a corporation,
Defendant.

Transcript of testimony and proceedings taken before the Honorable Jacob Weinberger, Judge, and Jury, on Monday, November 1, 1948, at 10:00 o'clock a.m. at Tucson, Arizona.

Appearances: On behalf of the Plaintiff George

Rumeh: Samuel H. Fowler, Esq., and A. L. Carlton, Esq. On behalf of the Plaintiff Bertha Lucille Rhodes: William G. Hall, Esq. On behalf of the Defendant Pacific Greyhound Lines: Alexander B. Baker, Esq. [1*]

PROCEEDINGS

(Court Reporter previously sworn by Clerk.)

(Jury roll called.)

Mr. Fowler: Now, we have one other motion, that Mr. A. L. Carlton of El Paso, Texas, who sits beside me, and who is admitted to practice in the Texas Circuit Court of Appeals, be admitted for the purpose of this case.

The Court: What is his name?

Mr. Fowler: A. L. Carlton.

The Court: What is the name of the——

Mr. Fowler: Rumeh versus Pacific Greyhound Lines and Bertha Lucille Rhodes; two cases consolidated.

The Court: Both?

Mr. Hall: As Mr. Fowler stated, there are two cases consolidated for trial, Rumeh versus Pacific Greyhound Lines and Bertha Lucille Rhodes versus the Greyhound Lines. I am appearing here representing Mrs. Rhodes and we would very happy to have these gentlemen associated in the trial of our case, and I believe Mr. Fowler wants to make a similar motion as far as the Rumeh case is concerned here.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

We do that so that in making objections it will quite facilitate the handling of the matter.

Mr. Fowler: I have made the motion in the Rumeh case.

The Court: The three counsel will act as counsel [2] in both cases?

Mr. Fowler: Yes.

The Court: I think we will have a further stipulation on that when we get down to the case. That may be ordered.

The Court: Call the calendar, Mr. Clerk.

The Clerk: Civil No. 426, Tucson, Bertha Lucille Rhodes, Plaintiff, versus Pacific Greyhound Lines, Defendant, and also Civil No. 67, Globe, George Rumeh versus Pacific Greyhound Lines.

Mr. Hall: The plaintiff is ready for trial.

Mr. Baker: The defendant has interposed a motion for dismissal on the grounds of the absence of a material witness, Alexander E. Hood. I think we showed due diligence in trying to get him here. This case has been continued, not due to the fault of counsel, but on account of the illness of Judge Speakman, and consequently we tried to get hold of the witness Alex E. Hood and immediately got out a subpoena and found that he was in the State of Maine and said he would return, but I only knew of it on the date that I filed the Motion for Continuance. Neither could we take his deposition or serve him by subpoena, so, I think I used due diligence in trying to procure the testimony of this witness, and as I have said, I have made the [3] affidavit stating what he would testify to.

Mr. Hall: If your Honor please, we oppose the

motion of counsel. This case was pending for a long time here in this court without any fault on the part of the plaintiff. We have prepared these cases for trial. Now, about their request for a continuance, until we got a copy of the motion last week, I think it was Thursday, we feel that the defendant has had ample time to secure depositions of this witness. This case has been pending, the Rhodes case has been pending about a year and a half and the Rume case has been pending for longer than that, and counsel has had a long time to secure depositions in this case from this particular witness, who Mr. Baker says is a material witness. We feel that the case should go to trial. There are witnesses from El Paso and there are a number of witnesses from El Paso and other places. We are here ready to go to trial. If the case was continued it would mean a great expense to the plaintiff and very much inconvenience to the plaintiffs and their attorneys and the witnesses in the case.

Mr. Baker: What Judge Hall says would ordinarily be true; I would have time to take depositions. If the Court please, I immediately got out a subpoena a few days after this case was set for trial and what [4] happened was, he advised by process server or his wife, that is, that he would be in Maine hunting.

The Court: How long has this case been at issue?

Mr. Baker: Two years.

The Court: The accident happened on March 25, 1946?

The Clerk: One case, your Honor, is November, 1946, and the answer filed in June, 1947.

The Court: That is two years and a half or thereabouts.

Mr. Baker: That is correct. This is a man we always thought would be present. He always agreed to be present. When the case was set for trial, the last time, I had to head him off by telegram. Judge Speakman was sick. I had to head him off. In other words, he was a witness that agreed to be present.

The Court: Was he ever present?

Mr. Baker: No.

The Court: This has been on the calendar——

Mr. Baker: Once before it was set for trial and then was postponed twice, was it, yes. Both times being postponed because of Judge Speakman not being able to be present. He always agreed to be present at the trial. We arranged for him to be present. We expected him to be present. He reported through——

Mr. Fowler: If it please the Court, Mr. Caldwell, [5] your Honor's secretary, knows how many times this case was at issue, set for trial. May I ask him how many times it was set for trial? The defendants have taken depositions in Bangor, Maine.

Mr. Baker: We knew she wasn't coming out here.

Mr. Fowler: The first time they made a request for a subpoena was nine or ten days ago.

Mr. Baker: For Alex E. Hood?

Mr. Fowler: Yes.

Mr. Baker: I challenge that.

The Court: What about this offer you made on your affidavit he would testify as stated in your affidavit? Do you offer that? Is there any objection?

Mr. Hall: Yes, we do object. We do not admit that the witness would so testify if he were present.

Mr. Baker: Oh, I have nothing further to say except just as I stated, these postponements are not on my suggestion or your suggestion; the postponements occurred on account of Judge Speakman's condition.

The Court: It seems to me that the case on the calendar, as long as this case has been pending, should be disposed of. I am afraid it is a long time between the framing of the issues and today. The issues were made—when was the answer filed?

The Clerk: Your Honor, Civil No. 67, Globe, Answer filed November, 1946, and Civil No. 426, [6] July 11, 1946.

The Court: Now, we have two years that have elapsed. I can see a reason for a continuance if it was the first time that something came up, or possibly the second time, but if it is not tried now, it will be another delay, which I don't think should occur.

Mr. Baker: May I ask something?

The Court: Yes.

Mr. Baker: There are two more witnesses, I don't know if I see them. May I ask if one of them is here? Captain Boone, is Captain Boone here?

Captain Boone: Yes.

The Court: I will say this, Mr. Baker, we don't have to continue today. We can go ahead in the morning and that will give you time to get your witnesses together.

Mr. Baker: Is Mr. Cody Bach here?

Mr. Fowler: Is he your bus driver?

Mr. Baker: Certainly. He is the bus driver that caused the accident. I will have to take until tomorrow morning.

The Court: I think you may take that time between now and tomorrow morning to gather up your witnesses.

Mr. Hall: May I suggest it would probably not [7] be necessary for the defendants to call their witnesses today because it will probably take most of the day to select a jury, and the plaintiffs to present their case. I make that suggestion that we can go ahead with the plaintiff's cases.

Mr. Fowler: We have the doctors here.

The Court: I suppose, Mr. Baker——

Mr. Baker: It is a terrible surprise. The bus driver is not here. The company advised he was to be here. Cody Bach, he isn't here, Captain?

Captain Boone: He came in yesterday afternoon.

Mr. Fowler: This is a situation, we have a doctor who came along here from El Paso, who is a physician and surgeon there and who has quite a practice. We have Mr. Holmes from El Paso, Howard Jones, Lieutenant of the El Paso Police, and police officers who want to get back tonight. We would like to have them put on. Mr. Hall has a doctor here. We have several witnesses who would like to get back if we could hear the matter this afternoon.

Mr. Baker: All right, I have no objections to putting on your doctors today. Let us recess until two o'clock and I will find my driver.

Mr. Fowler: We have to give the gentlemen some time to vote tomorrow. I think tomorrow is election day. [8]

The Court: Well, tomorrow everybody can do their voting before ten o'clock.

Mr. Fowler: I think so.

Mr. Hall: If we could select the jury and the other jurors be excused and then go ahead with our case——

The Court: I think what we will do is this: we will excuse the jury until three o'clock. That will give me time to look over the papers. I just came here this morning.

Mr. Baker: And that will give me time to find my driver.

The Court: Find your driver if you can. We can proceed with the case at three o'clock. The jury is excused until three o'clock and return up here at three o'clock.

I would like to see counsel for a moment.

(Thereupon Court recessed at 10:45 o'clock a.m. until two o'clock p.m.)

Afternoon Session

The Court: Call the calendar, Mr. Clerk.

The Clerk: Civil No. 426, Tucson, Bertha Lucille Rhodes versus Pacific Greyhound Lines and Civil No. 67, Globe, Rumeh versus Greyhound Lines, for trial.

The Court: Are you ready, gentlemen?

Mr. Carlton: Ready. [9]

Mr. Hall: The plaintiffs are ready, your Honor.

Mr. Fowler: The plaintiffs are ready.

Mr. Baker: We interposed a motion for postponement of the trial and you haven't ruled on it yet, your Honor.

The Court: The motion is denied.

Mr. Baker: Naturally, I am ready. Mr. Bach is ready.

The Court: I think there is a stipulation on file as to the trial of these two cases together.

Mr. Carlton: Yes.

The Court: The same effect as though both plaintiffs were joined in one complaint, is that correct?

Mr. Baker: They are together for the purpose of trial.

The Court: Is the stipulation on file to that effect?

Mr. Fowler: Yes, your Honor, I thought there was. I can't find a copy.

Mr. Baker: I can so stipulate.

Mr. Hall: I will stipulated now as to that file.

Mr. Baker: There was a motion and order. I think there was a minute entry order.

The Court: Have you a copy of the order?

Mr. Baker: There would be nothing but a minute [10] entry under our practice.

The Court: Both?

Mr. Fowler: Yes, the motion may be granted is before your Honor.

Mr. Baker: It was granted, I know.

The Court: Let the record show that they are consolidated.

(Jury impaneled and sworn.)

Thereupon after counsel for the respective parties read their complaints and answers and made their opening statements to the jury, the following proceedings were had:

Mr. Baker: I will reserve my opening statement until the close of the plaintiffs' case.

The Court: Call your first witness.

Mr. Carlton: Dr. Long.

The Court: Would you gentlemen prefer to proceed tonight with your witness or would you rather wait until tomorrow morning?

Mr. Fowler: The doctor has to go back to El Paso tonight. It won't take him very long.

DR. A. D. LONG,

being called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Carlton: [11]

Q. Please state your name to the Court and jury.

A. Dr. A. D. Long.

Q. Dr. Long, where do you live?

A. El Paso, Texas.

Q. What is your business or profession?

A. I am a physician.

Q. How long have you been a physician?

A. Forty years.

Mr. Baker: Ask him if he is registered and licensed to practice in El Paso, Texas, and I will admit his qualifications.

Q. Are you duly licensed to practice in the State of Texas? A. I am.

Mr. Baker: We will admit his qualifications.

Q. Doctor, are you acquainted with George Rumeh? A. I am.

Q. How long have you known him?

A. Since May, 1946.

Q. Doctor, what is the nature, the general nature of your practice of medicine? A. How's that?

Q. What is the general nature of your practice of medicine?

(Testimony of Dr. A. D. Long.)

A. I do tuberculosis x-ray, all kinds of x-ray work and diagnosis.

Q. Do you do your own x-ray work? [12]

A. I do.

Q. Do you have an x-ray laboratory?

A. I do.

Q. I believe you said you had been acquainted with Rumeh since May, 1946? A. Yes.

Q. Did you make an examination of him on or about the 24th day of May, 1946? A. I did.

Q. Do you have with you any of the notes or memoranda that you may show the results or conclusions that you reached during that examination?

A. Yes, I do.

Q. What did you find to be his condition at that time?

A. Well, I examined him because of an injury he is supposed to have sustained in a transportation accident and he had some—he had a scalp wound; his nose was injured and his arm and shoulder were damaged and he had some pains in his back. I did a general x-ray examination in the case.

Q. Did you make an x-ray examination of his chest? A. I did.

O. What did you find?

A. Well, I found what is evidently an old tuberculosis lesion in the right lung, and I found some—that there [13] was some fluid in there, evidently of recent development, and I also found that the right shoulder, arm bone was broken in the shoulder joint.

Q. Now, did you make any examination of his ribs?

(Testimony of Dr. A. D. Long.)

A. Yes, he had a fractured rib on the left side and one on the right, as I recall.

Q. State whether or not he had tuberculosis at the time you examined him?

A. Well, he had an inactive tuberculosis at that time, but he had an active tuberculosis.

Q. Have you examined him since that time?

A. Yes, I have examined him several times since then.

Q. What was the result of your examination? What were your findings on the second time you examined him?

A. Well, I found that the old tuberculosis lesion had been reactivated by the injuries, and that the fluid in the pleural cavity had increased and the right lung had shrunk and had become more incapacitated.

Q. What did you find as to the condition of his arm, his shoulder?

A. Well, he had a fracture in the shoulder joint, had a fixation of the shoulder joint where he had to move the whole arm with the shoulder blade in order to get motion to some extent. He had to move his [14] shoulder blade. He has no free motion of the arm and the humerus, the long bone, was broken and driven into the joint, into the shoulder.

Q. What do you mean by fixation of movement?

A. Fixation?

Q. Of movement.

A. That means that the shoulder joint, instead of being able to move in the joint, it had become fixed by fibrosis, scar tissues, and adhesions, and the joint

(Testimony of Dr. A. D. Long.)

would not move, and in order to get his arm to move freely, his shoulder joint had to move with it.

Q. Is that a condition that will improve with time?

A. It might improve some, but it will always trouble him. It is a bad condition also.

Q. As to the tubercular condition, has it improved since you saw him on the first occasion?

A. No, the tubercular condition is worse now than it was then.

Q. When was the last time that you made an examination of Mr. Rumeh?

A. About three days ago.

Q. Where? A. In El Paso.

Q. In your office? A. Yes.

Q. Do you use a fluoroscope in your practice?

A. I used a fluoroscope and also took an x-ray at the time to see what changes took place from the previous examination.

Q. What did you find; did you find any improvement?

A. Well, no, I didn't find any improvement. He had probably a little more function in the arm, shoulder joint, but his lung condition is worse. He had less breathing space than he had before.

Q. What was the condition of his ribs?

A. I don't think the ribs would be important. They got well. That just merely showed the severity of the injury he had sustained. He had sustained enough injury to that side to fracture a rib and break the shoulder joint, you know, but when the ribs got well they were all right.

(Testimony of Dr. A. D. Long.)

Q. What did you find on this last examination as regards his tubercular condition?

A. Well, his lung was contracted and the tissue that was air-containing tissue when I first saw him, has now contracted and there is no air going into it. His right lung is not functioning at all.

Q. Would you care to make a demonstration and show the jury what you are talking about?

Mr. Baker: I think I will object to that, the demonstration, I will object to that.

A. With the x-rays? [16]

Mr. Baker: To any demonstration.

Q. Then, Dr. Long, will you show—did you take x-ray pictures of Mr. Rumeh on this last examination? A. I did.

Q. Do you have those x-ray pictures with you?

A. Yes.

Q. Will you show the x-rays you made on former occasions and the ones you made recently and explain to them the change that appears by virtue of those x-rays? A. I will try to.

Mr. Baker: I reckon you better mark them for identification or offer them in evidence.

The Court: Mark them.

The Clerk: Plaintiffs' Exhibit No. 1. This will be No. 2. (Indicating.)

(Thereupon the above-referred to x-rays were marked for the purpose of identification as Plaintiffs' Exhibits No. 1 and No. 2.)

Q. All right, Doctor, that is No. 1. (Indicating.)

Mr. Baker: Well, I think I will object to it being

(Testimony of Dr. A. D. Long.)

submitted to the jury before it is submitted in evidence. It is demonstrated to the jury before it is admitted in evidence.

Mr. Carlton: If the Court please—— [17]

Mr. Baker: To save time, if he will qualify his x-ray——

The Witness: That is just right to show it that way. (Indicating.)

Mr. Baker: Ask him who made this?

Q. Who made this x-ray picture?

A. Yes.

Q. Who made it? A. I made it.

Q. It has been in your possession since you made it? A. Yes.

Q. Has it been out of your possession?

A. No.

Mr. Carlton: We offer Plaintiff's Exhibit——

Mr. Baker: Ask him when he made it.

Q. When did you make this?

A. I made this on the 18th day of May, 1946, the first time I examined him.

The Court: Now, have you made your offer?

Mr. Carlton: We offer it in evidence.

The Court: It may be received.

Q. Now, Doctor——

A. Now, this man is standing with his back to you. This is the spinal column down here. (Indicating.)

The Court: Pardon me, Doctor, stand to one [18] side so that the jurors can see.

A. The spinal column—let us reverse it so they will catch it better. Now, he is standing with his back

(Testimony of Dr. A. D. Long.)

to you; the heart, belly, the nipple line—this is the heart shadow here (indicating), it is pulled over to this side. This is the normal left lung and this is the belly or abdomen below. All the dark area is air-containing tissue. And this lung is in fairly good shape, but you see how this one is contracted, and there is air-containing tissue here, down here, and then there is excessive fluid coming around here that he developed evidently as a result of the injury, and as time goes on, now, as I will show you, this air-containing lung structure on the right side has gradually diminished because of scar tissue and inflammation, and I stated to him when I found this condition—(indicating).

Mr. Baker: Wait a minute, we object to that as hearsay.

The Witness: Pardon me.

The Court: Objection sustained.

A. That is all to that one. We will put the other one on.

Q. Now, Doctor, referring to Plaintiffs' Exhibit 2, what is this (indicating)?

A. This is the picture I made two, three or four [19] days ago, the last time he was in the office, x-ray of Mr. George Rumeh's chest.

Q. Have you made this x-ray yourself?

A. I have.

Q. It has been in your possession since you made it?

A. It has.

Q. It hasn't been out of your possession?

A. No.

Mr. Carlton: The plaintiffs would like to offer

(Testimony of Dr. A. D. Long.)

this in evidence as Plaintiffs' Exhibit 2 (indicating).

The Court: It may be received. Any objection?

Mr. Baker: No objection.

Mr. Fowler: Let the record show no objection.

The Court: You have the answer of Mr. Baker that there was no objection?

The Reporter: Yes.

(Thereupon the above-referred to x-ray, having been marked for the purpose of identification as Plaintiffs' Exhibit 2, was received in evidence.)

A. There is no air-containing tissue. There isn't any where there was one-third of the lung functioning previously. And down here, that is all filled in, and this fluid area has become enlarged, consolidated, so his right lung is not functioning at all now. The ribs are flattened down on it. The ribs and chest pull the other way and he really has one lung [20] there now, where he had a lung and fifty per cent of the other lung previously. I believe that is all I can show you about that.

Q. Did you prescribe any treatment for Mr. Rumeh the first time you treated or examined him?

The Court: Just a minute.

Mr. Baker: I will object to that, as to what treatment he prescribed.

A. Might I show the picture of that shoulder joint?

Q. Yes, let us have that too, Doctor.

The Court: Mark that for identification.

(Testimony of Dr. A. D. Long.)

Mr. Carlton: Mark it Plaintiffs' Exhibit 3, (indicating).

The Clerk: Plaintiffs' Exhibit No. 3 for identification.

(Thereupon the above-referred to x-ray was marked for the purpose of identification as Plaintiffs' Exhibit No. 3.)

Q. Doctor, this exhibit is marked Plaintiffs' Exhibit 3, will you state what it is (indicating)?

A. It is an x-ray of the right shoulder in the case of Mr. Rumeah.

Q. Who made that picture?

A. I made this picture.

Q. Have you had it in your possession since you made it? A. Yes. [21]

Q. Has it been out of your possession since that time? A. No.

The Court: When was it made?

Q. When was it made?

A. It was made at or about the time the first one was made, the 18th day of May, 1946. I will take this one out (indicating).

Mr. Baker: Are you going to offer it in evidence?

Mr. Carlton: We would like to offer it in evidence.

Mr. Baker: No objection.

The Court: It may be received.

The Clerk: Plaintiffs' Exhibit 3 in evidence.

(Thereupon the above-referred to x-ray, having been marked for the purpose of identification as Plaintiffs' Exhibit 3, was received in evidence.)

(Testimony of Dr. A. D. Long.)

Q. Doctor, what is that?

A. That is a picture of the apex or top of the right lung and right shoulder joint, showing the upper end of the femur, scapula, the collarbone, and the top of the right lung.

Q. Now——

A. Now, you will see here that at that time there was air-containing tissue at the top of that lung [22] and was functioning fairly good. The dark area shows there was air in it. You can see here the sleeve-like appearance, if you can see it closer there is a break right across here. (Indicating.) This bone was broken here and driven—it is sloped by there, sloped here. The shaft of the bone is driven into the soft part of the head of the bone and the rotating part of the head of this bone is turned down and flat and the bone is shoved up by it, and that united that way. This has been that way for several months and was practically healed at the time and there is nothing you can do about it. You can't shorten it. It is left in that fix and will always be that way.

Q. From your examination of him this last week, state whether or not it is your opinion that that condition has improved or has gotten worse or is the same.

A. He can move this function of the shoulder joint very slightly, but when he moves this arm, the shoulder blade has to go with it. It has to work up and down like a hinge, and a fixation in here, where this femur, humerus doesn't rotate in the shoulder joint, he has to work the shoulder blade to work the arm to any great extent. (Indicating.)

Q. The condition that you found in addition, with

(Testimony of Dr. A. D. Long.)

regard to his nose, has that condition been relieved [23] or is it something that would bother him in the future? A. No, it is a permanent condition.

Q. The wound that you observed on his scalp, has that become permanent or does——

A. That is healed with evidently no bad effects.

The Court: Are you through with this light now?

Mr. Baker: I'm not quite through. I have cross-examination.

The Court: I was going to say that it might be discarded for the time being until cross-examination. All right.

Q. Now, Doctor, from the examination that you made of Rumeh the first time and all subsequent examinations, including the examination made last week, state whether or not, in your opinion, these conditions that you have described are temporary or are they permanent?

A. They are permanent.

Q. Doctor, from the nature of the injuries that you have described, from the examinations that you have made, state if you have an opinion whether or not they are total?

A. They are total. He is not able to work. He doesn't have enough breathing space to carry on work, and with his arm crippled, he is handicapped in that [24] respect, you know, if he started to work with one lung out of commission and diseased, he wouldn't be able to do it and it won't be any better.

Mr. Carlton: Take the witness.

(Testimony of Dr. A. D. Long.)

Cross-Examination

By Mr. Baker:

Q. When was the first time you examined him, Dr. Long?

A. You will have to talk a little louder. I have hay fever. I don't hear good.

Q. When did you first examine Mr. Rumeh?

A. May 18, 1946.

Q. Will you please put your Plaintiffs' Exhibit No. 1 up there (indicating).

A. This bottom one.

Q. Did he give you a history of having an accident on March 25, 1946?

A. I beg your pardon?

Q. Did he give you a history of having an accident on March 25, 1946?

A. He gave me a history of having an accident a few months prior to the time that I examined him; I don't remember the exact date.

Q. A few months prior? A. Yes.

Q. Are you—you state that you knew that he had [25] had tuberculosis before the time of this accident? A. Yes.

Q. Will you please show on Plaintiffs' Exhibit No. 1 the lesions that he had in his lungs prior to the time of the accident.

A. The thing that makes me know he had trouble there is because of the light appearance of this area here (indicating). When I made the picture and checked it, I told him he evidently had tuberculosis there. He told me he had. This light area here is old

(Testimony of Dr. A. D. Long.)

scar tissue. While he was all right and able to go about his business——

Q. Just a minute; just a minute, don't make a speech.

A. That is how I knew it. There is the evidence there. The light area which you see would not have been caused from anything else.

Q. You know from that light area in the right lung, that he had lesions there before the time of the accident? A. Yes.

Mr. Baker: That is all. Just one question.

Q. That is the same lung you now say there is no air space in? A. Yes, but——

Q. Just answer my question. [26]

A. Yes, I will say there is no air space in there; it has been obliterated.

Mr. Baker: That is all.

The Court: Anything further.

Mr. Carlton: That is all. Now, if the Court please, may Dr. Long be excused to go back to El Paso?

Mr. Baker: Yes.

The Court: If there is no further need for the doctor, he may be excused. These exhibits, are all of them here, are they?

Mr. Carlton: Yes, sir, they are all here.

The Court: Gentlemen of the jury, we are about to take a recess until tomorrow morning. I admonish you not to discuss this case amongst yourselves or with anybody else or allow anybody to discuss it in your presence. Furthermore, you are not to express an opinion of the merits of this case until this case has been submitted to you for your decision.

You are now excused until ten o'clock tomorrow morning.

I will ask counsel to step forward at this time.

(Discussion had outside the record.)

(Thereupon Court was adjourned at five o'clock, p.m., November 1, 1948, to Tuesday, November 2, 1948, at ten o'clock, a.m.) [27]

Tuesday, November 2, 1948—Ten o'clock a.m.

The Court: It is stipulated that all the jurors are present?

Mr. Baker: Yes, your Honor.

The Court: You may proceed.

Mr. Carlton: If the Court please, the plaintiffs would like to put Mr. Cody Bach on the witness stand at this time as an adverse witness under the rules.

Mr. Baker: He is not the managing officer. Under our statute only the managing officer can be put on as an adverse witness.

The Court: Is he a managing officer?

Mr. Baker: He is only a driver.

The Court: Where is your statute?

Mr. Baker: Do you have the Code here? I think Judge Hall, you can concede that?

Mr. Hall: It is managing officer.

The Court: I would rather look at the statute to make sure.

Mr. Hall: I think he has to be a manager, superintendent, or having some supervision over the operation.

The Court: Well, if you stipulate as to that, I have no need to go any further.

Mr. Hall: I just suggest this: The reason I don't

want to stipulate to it, if the Court please, is because he was in charge of a certain department at [28] that particular time. I don't know if that will be sufficient.

The Court: Will you find the statute?

Mr. Baker: We have practiced here a long time—

The Court: Have you looked under "Witnesses"?

Mr. Hall: I think he is right.

Mr. Carlton: I will call Viola Tuck.

The Court: Are you abandoning that for the moment?

Mr. Carlton: I guess I am, your Honor, under the advice of Arizona counsel. I guess we will for the time being. I would prefer to put him on if I can.

The Court: If you find you can, you may put him on later.

VIOLA B. TUCK,

called as a witness on behalf of the plaintiffs, being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Carlton:

Q. Please state your name.

A. Viola B. Tuck; Mrs. Carlton W.

The Court: How do you spell the last name?

The Witness: (Spelling) T-u-c-k.

Q. Where do you live? A. El Paso, Texas.

The Court: Is this your usual arrangement for the witness chair? Or can the witness face the jury more directly. I think you can face the jury more directly.

Q. Talk loud enough so that the Court can hear you, as well as the jury.

(Testimony of Viola B. Tuck.)

Where were you living on or about the 25th day of March, 1946? A. Lordsburg, New Mexico.

Q. How long had you been living in Lordsburg at that time? A. A little over a year.

Q. Were you employed at that time?

A. Yes, sir.

Q. For whom were you working?

A. The Pacific—working for the Greyhound Cafe; employed by Tom Shoon, manager of the cafe.

Q. What were your duties there?

A. Cashier, and ticket clerk.

Q. As cashier what did you do; what were your duties?

A. To receive money from the cafe customers.

Q. As ticket agent what did you do?

A. Sold tickets on the Greyhound Lines.

Q. Were you employed by the Greyhound Lines?

A. No.

Q. As ticket agent did you have access to the bus [30] schedules and bus fares and things of that kind?

A. I was employed by the agent, but I did have access to the ticket tables, but I wasn't the agent.

Q. Were the tickets you sold printed with the fares—tickets printed with the fares direct or did you figure out the fares?

A. They were left blank for the amount.

The Court: Is there any dispute about that?

Mr. Baker: I didn't hear the question. The paid passenger? I admitted he was a paid passenger. I think the pleadings admitted that.

Mr. Carlton: If the Court please, I want to get

(Testimony of Viola B. Tuck.)

in evidence the bus schedule. I am trying to lead up to that bus schedule. If the Clerk please, I need that deposition because that is in it. Excuse me just a minute.

The Court: Certainly.

Mr. Carlton: Mark this for identification, please.

The Clerk: That is Plaintiff's Exhibit No. 4 for identification.

(Thereupon the above-referred to document was marked for the purpose of identification as Plaintiffs' Exhibit No. 4.)

Q. You have testified, Mrs. Tuck, that you had access to the time tables, or acquainted with the [31] time tables. I hand you Plaintiffs' Exhibit 4 and ask you to state what that is (indicating).

A. That is the time table Schedule No. 9 in effect at the time of the accident and issued in December, 1945.

Mr. Carlton: We would like to introduce it in evidence.

Mr. Baker: May I see it? We object to the offer on the grounds that it would be immaterial in any respect, and in addition it has not been properly qualified or identified. She admits she is not the agent of the Pacific Greyhound Lines, nor an employee of the Pacific Greyhound Lines.

The Court: What was that?

Mr. Baker: She is not an employee of the Pacific Greyhound Lines let alone an agent. She has already testified to that. I don't know how she can testify about that. It doesn't show on the face it is the

(Testimony of Viola B. Tuck.)

effective tariffs and schedule in effect at the time of the accident.

The Court: I didn't keep such good track of her testimony.

Mr. Baker: She specifically testified that she was not an employee of the Greyhound Lines and not an agent.

The Court: What else did she testify to? [32]

Mr. Carlton: She sold tickets for the Greyhound which was binding upon——

The Court: She testified about bus schedules?

Mr. Carlton: Yes, she said she had access to them and used them.

Mr. Hall: I think, if the Court please, that would make it admissible.

Mr. Carlton: She was an agent and binding the company although she said she was not an agent.

The Court: She testified she sold tickets?

Mr. Carlton: Sold tickets.

The Court: And distributed these schedules?

Mr. Carlton: That's right.

The Court: And check back?

Mr. Carlton: And check back.

The Court: Objection overruled.

The Clerk: Plaintiffs' Exhibit 4 in evidence.

(Thereupon the above-referred to document having been marked for the purpose of identification as Plaintiffs' Exhibit 4 was received in evidence.)

Q. Now, Mrs. Tuck, does that schedule referred to there as Plaintiffs' Exhibit 4, does it show mileage

(Testimony of Viola B. Tuck.)

between the destinations shown on the schedule?

Mr. Baker: Just a minute; just a minute; if the Court please, I object to that. The exhibit speaks for itself. They introduced it. She testified she [33] was not an agent of the company.

The Court: I think that is correct.

Mr. Carlton: I will withdraw the question.

Q. Mrs. Tuck, were you a passenger on a Greyhound bus on or about the 25th day of March, 1946?

A. Yes, sir, I was a paid passenger.

Q. Where did you board the bus?

A. Lordsburg.

Q. Who was the driver of the bus?

A. Cody Bach.

Q. Did you know Cody Bach?

A. I knew him in the depot, yes.

Q. How long have you known him?

A. Until I went to work for——

The Court: I can't hear the witness.

Q. You will have to talk louder. You knew Cody Bach as a driver for the Greyhound Bus Company?

A. Yes, sir.

Q. Did you observe the time that he came into Lordsburg on the day in question? A. I did.

Q. Did you have any conversation with him when he came in?

A. To the effect that I had planned to go to El Paso.

Mr. Baker: Just a minute; just a minute; answer "yes" or "no". [34]

Q. Did you have any conversation with him?

A. Yes.

(Testimony of Viola B. Tuck.)

Q. What was the conversation?

A. I informed him that I was coming to El Paso on his bus.

Q. Was any other conversation had between him and you relative to your coming to El Paso and your working late?

A. Yes.

Q. What was that conversation?

Mr. Baker: Just a minute; we object to that as being hearsay, immaterial and irrelevant.

The Court: About coming to work?

Mr. Carlton: No, she was coming to El Paso with him on his bus run and I just wanted to get in the conversation relative to it and what happened, to show the friendly relation between her and the company and the driver, if it is admissible for that purpose.

Mr. Baker: That is not admissible, that is not proper in this case.

The Court: She may testify generally in that respect without going into too many details.

Q. All right. Did you check your baggage?

A. I did.

Q. And was it put into the bus? [35]

A. It was put on the bus but it was not checked in at the time on the bus.

Q. Who tore up the check, if anyone?

A. Mr. Bach.

Q. Where were you sitting on the bus?

A. Third row, aisle seat, behind the driver.

Q. Were you sitting in the seat all the way from Lordsburg to the point where the car did not travel any farther?

A. Yes, sir.

(Testimony of Viola B. Tuck.)

Q. Do you know whether or not the bus was late leaving Lordsburg? A. It was.

Q. Do you know whether or not the bus was late arriving at Deming? A. It was not.

Q. Do you know whether or not the bus was late leaving Deming? A. It was.

Q. How much late?

A. Approximately eight minutes.

Q. Was that bus involved in an accident with a Ford automobile at a point somewhere between Deming and Las Cruces and about eight or nine miles west of Las Cruces? A. It was. [36]

Q. What time of day was the accident?

A. Approximately 6:10.

Q. Do you know whether or not the bus was on time at the point of the accident? A. It was.

The Court: Was that morning or evening?

The Witness: Evening.

Q. You said it was about eight minutes late leaving Deming and it was on time at the point of this accident. How far is it there from Deming to Las Cruces? A. Sixty miles.

Q. What is your testimony as to the distance between the point of this accident and Las Cruces?

Mr. Baker: If she knows.

A. Approximately eight miles.

Q. What was the speed at the time of this accident, or just immediately prior thereto?

A. I wasn't conscious of any change in the rates of speed until the brakes were applied and I was

(Testimony of Viola B. Tuck.)

thrown forward breaking my teeth and knocking them out.

Q. Were you thrown to the floor of the bus at that time? A. Not the first time.

Q. After you were thrown forward as you testified, did you straighten yourself up and look out in front [37] of the bus? A. I raised my head.

Q. Did you look out in front? A. I did.

Mr. Baker: Just a minute, we object to his leading the witness.

The Court: Yes, the objection is well taken.

Q. What did you see when you looked out?

A. I saw the car approaching the bus on the bus' side of the road, just far enough away so that I could see the entire car and it turned sharp to the left.

Q. Now, at the time you looked out, I believe you said that the car was on the left, on its left?

A. On its left; the bus' right side of the road.

Q. What was the course of the bus, was it straight down the center or——

A. The bus was straight down his side.

Q. At the time you looked up, was it straight down or turning to the right or what was its direction?

Mr. Baker: We object to his leading the witness. She already testified——

The Court: What was that?

Mr. Baker: Objection to the question on the ground, first, it is leading. She already answered the question and he is trying to lead her. [38]

The Court: She may answer.

(Testimony of Viola B. Tuck.)

Q. Go ahead.

A. The bus had started to move off to the right of the road very slightly.

Q. Now, how far would you estimate that it was from the bus to the car at the first time you saw the car?

A. I wouldn't know the distance in feet, but I should presume it was to the end of this courtroom (indicating).

Mr. Baker: Just a minute; we object to that. She said that she was assuming something.

A. The distance in feet——

The Court: Just a moment; when there is an objection by counsel withhold your answer until the Court rules.

Mr. Baker: If she is going to "presume" something—that is her testimony.

The Court: The objection is well taken. That portion of the answer may be stricken out.

Q. Can you estimate the distance?

A. To the end of the courtroom.

Q. Were you in the bus at the time of the crash?

A. I was.

Q. Do you know whether or not the Ford hit the bus head on, or did it hit it from the side, or how was the point of impact between the two vehicles? [39]

A. Slightly on the side.

The Court: What is that answer?

The Witness: Slightly on the side.

Q. Slightly on the side. You mean by that the

(Testimony of Viola B. Tuck.)

Ford hit the bus on the side or the bus hit the Ford on the side?

A. The bus hit the Ford on the side. The Ford had already started to turn sharp left.

Q. And the bus hit the Ford?

A. The bus hit the Ford.

Q. Was the point of impact on the pavement or partly off or partly on?

A. It was partly off; on the edge of the pavement.

Q. Where were you after the bus came to a final stop?

A. On the floor between the seats.

Q. Where was the bus as regards the highway?

A. It was entirely off the highway.

Q. Now, by that do you mean that it was off of the pavement or off of the shoulder or off both?

A. It was off the pavement, a foot and a half off, all wheels resting off.

Q. Where was Bach when the bus came to a stop?

A. When I first saw him, he was lying prone in front of the bus.

Q. How far would you say he was in front of the bus? [40] A. Thirty feet.

Q. Did you know George Rumeh at the time?

A. No.

Q. Do you know him now? A. Yes.

Q. Did you see him at the time of this crash? Or immediately thereafter? A. No.

Q. Do you know where he was after the crash?

Mr. Baker: Just a minute; didn't she answer that she didn't know where he was?

(Testimony of Viola B. Tuck.)

The Court: I don't recollect, there is no question about that.

Mr. Baker: What is her answer?

The Court: No questions were asked about that.

Q. Do you know where George Rumeah was after the crash? A. He wasn't in the bus.

Q. Well, did you see more than one person out on the sand in front of the bus after the crash?

A. I was only looking for one person. I knew no one else on the bus. The driver wasn't there. I didn't know anyone else. I wasn't looking for anyone.

Q. Did you get off the bus at once? A. No.

Q. Did you speak to Cody Bach before you got off the [41] bus and while he was on the ground?

A. I did.

Q. What was your conversation with him about?

A. I asked him if there was anything he wanted me to do.

Q. What did he tell you?

A. He asked me if any of the passengers were injured in the bus. I told him, "Yes." He told me where the first aid was. I opened the box on the front seat, took the bandages, iodine, ammonia, and so forth, took it and started to give some of the passengers first aid immediately.

Q. Now, you did physically get off the bus?

A. I did.

Q. Do you know Captain Salas of the New Mexico State Highway Police?

A. I know him now, yes.

(Testimony of Viola B. Tuck.)

Q. Did you see him there that evening at any time? A. I did.

Q. At the time you got off the bus, had Captain Salas arrived, or arrived later?

A. Captain Salas arrived when I got off the bus.

Q. The persons that were injured, were any of them injured enough so that it was necessary to take them away in an ambulance? A. Yes. [42]

Q. Do you know who was driving the Ford car, a man or a woman, or who the passengers were in the Ford car?

A. Only what I have been told since the accident.

Q. And do you know what became of them?

A. They were still there when I left.

Q. After you got off the car—withdraw the question. Did you receive any injuries in this crash?

A. I did.

Q. What were your injuries?

A. I had two teeth cracked; one broken off to the extent it had to be pulled. The front tooth——

The Court: I can't hear you; just speak slowly and distinctly and then we will all hear you.

A. Two teeth were cracked; needed repair; one broken off at the roots and had to be replaced. I had a sprained wrist, sprained ankle, wrenched shoulder, and trouble with my back which I still have and will have for the rest of my life; bruised shin; broken veins in the leg.

Q. Did you file suit in this matter?

A. I did.

(Testimony of Viola B. Tuck.)

Q. How long was it after you got off the bus before you were taken to Las Cruces?

A. A half hour.

Q. What were you doing all that time? [43]

A. Walking around trying to ease the pain in my teeth, my shins, my back.

Q. Did you make an observation and can you tell where the point of impact was between the Ford car and the bus?

A. Very definitely.

Q. How could you tell it?

A. Debris on the highway, on the shoulder, sand thrown up on the road, splinters, glass and marks where the car had been pushed.

Q. The Ford car had been pushed?

A. Yes.

Q. How far did the bus go after it passed the point of impact?

A. A half block.

Q. And I believe you testified that it stopped entirely off the pavement?

A. Yes, sir.

Q. Did you make any observations and did you and were you able to find any evidence of the bus having put on brakes prior to the accident?

A. There were skid marks back up the highway.

Q. How far were those skid marks from the point of impact?

A. A block.

Q. A city block? [44]

A. A city block.

Q. Those skid marks that you found back there, were they skid marks made by a dual wheel or a single wheel?

A. Dual wheel.

Q. By a dual wheel, what do you mean?

A. Two wheels on either end of the axle.

(Testimony of Viola B. Tuck.)

Q. Describe those marks that you found back there about a block away?

A. They were very heavy to begin with and gradually faded away and slightly at an angle at the right of the road.

Q. Was the angle to the right or left?

A. To the right toward the borrow pit.

Q. Toward the borrow pit. Were your injuries to your tooth caused by the original application of the brakes back there or was it caused by the crash of the Ford car?

A. As far as my mouth and teeth was concerned, that was by the brakes being applied.

Q. Back there a block away?

A. A block away.

Q. How come you filed your suit in El Paso?

Mr. Baker: We object to that as immaterial and irrelevant.

The Court: Sustained. [45]

Q. Mrs. Tuck, did you later go on to El Paso that evening? A. I did.

Q. How long did you stay in El Paso on this visit? A. Two or three days.

Q. During that time did you consult medical or dental assistance?

Mr. Baker: Just a moment; if the Court please it is wholly immaterial in this case. This is not Mrs. Tuck's case.

The Court: Objection sustained.

Q. Mr. Tuck, I believe you said this accident was about 6:10 in the afternoon of March 25, 1946?

A. Yes, sir.

(Testimony of Viola B. Tuck.)

Q. On or about March 27, 1946, did you sign any papers that purported to deal with the circumstances surrounding this incident?

Mr. Baker: Just a minute; we object to that as being wholly immaterial, irrelevant, if the Court please, it would be hearsay. I don't know what she signed; nothing to do with this case.

The Court: What is the purpose of that inquiry?

Mr. Carlton: If the Court please——

The Court: Come up to the bench.

(Counsel and Court confer out of the hearing of the Jury as follows): [46]

Mr. Carlton: If the Court please, she did sign such a statement and she has been interrogated about it, although she has never seen it.

Mr. Baker: It hasn't been in this case, has she?

Mr. Carlton: She will be.

Mr. Baker: I am trying my case, too.

The Court: When that will be produced, you can cross-examine and show the true facts with relation to it.

Mr. Carlton: All right.

The Court: Objection is sustained.

(To the Jury.)

Q. Mrs. Tuck, at the time you were thrown forward and broke your tooth and you looked up and saw this car coming, state whether or not the car at that time had already swerved to its left or was it approaching from the opposite direction on its wrong side of its highway?

(Testimony of Viola B. Tuck.)

A. As I first glanced up the car was coming straight towards the bus and at the same instant turned sharp left, and by that time they were together.

Q. You didn't see the car until after you had been thrown forward and your tooth knocked out?

A. I had been reading. I wasn't conscious of anything until the brakes were applied and I was thrown [47] forward.

Q. After you were thrown forward, how long would you say it was before you saw the car turn to its left?

Mr. Baker: Just a minute; we object to that, if the Court please. She already answered. She said she saw it at the same instant. She already testified. They didn't like the answer, so they asked another question. She testified when she looked up she saw the car coming toward the bus and at the same instant—

The Court: She may answer.

A. When I first saw the car it was far enough away so that I could see the entire car, and it turned sharp to its left and approaching——

Q. At the time you saw the Ford car, had you been already thrown forward and your tooth knocked out? A. I had.

Q. How long would you say it was from the time you were first thrown forward until you were able to look up and see the car? A. A half a minute.

Mr. Carlton: That is all. Take the witness.

(Testimony of Viola B. Tuck.)

Cross-Examination

By Mr. Baker:

Q. Mrs. Tuck, you state that—— [48]

The Court: Do you want to change your position over there?

Mr. Baker: Not right now.

Q. Mrs. Tuck, you state that at the time of this accident you were employed in some cafe in Lordsburg? A. Yes.

Q. How long had you been employed at that cafe?

A. Six months.

Q. You were working for whom?

A. Tom Shoon and D. S. Pons and Topsy.

Q. And those?

The Court: I didn't get that answer.

Q. Those three men were the owners and operated this cafe?

A. Yes, sir, they had three partners. I only know the third by nickname.

Q. That cafe was not operated by the Pacific Greyhound Lines? A. No.

Q. You were, you say, the cashier in this restaurant, is that right?

A. Cashier and sold tickets in conjunction——

Q. Cashier. We will stop with that.

A. All right.

Q. As to your duties as cashier, you also sold tickets on the Greyhound Lines? [49]

A. And connecting lines.

Q. That was, however, for these three men that you mentioned that you worked for?

(Testimony of Viola B. Tuck.)

A. We collected the fares.

Q. They did. A. Yes, sir.

Q. I mean they evidently got the money.

A. Yes, sir.

Q. As far as you were concerned you were at all times working for these three men plus the two nick-names?

A. I know—one was known as Lee and the other as Bum Cook.

Q. And I believe you stated that you were going to El Paso this day? A. Yes, sir.

Q. And Cody Bach was the driver of the bus?

A. Yes, sir.

Q. Which you boarded. How long had you known Cody Bach as a driver?

A. Since I have been employed there.

Q. How long was that? A. Six months.

Q. He had been on regular runs for six months at that time? A. Yes, sir. [50]

Q. You proceeded from Lordsburg to Deming?

A. Yes, sir.

Q. You left Deming, do you know at what time; do you know?

A. No, sir, I don't know the exact time. I know that we were late.

Q. How late? A. Eight minutes.

Q. How did you know that? That you were eight minutes late if you didn't know the time, Mrs. Tuck?

A. I had no schedule in front of me. I was to meet my husband at El Paso. We had an engagement. I worked in the cafe at Lordsburg until the

(Testimony of Viola B. Tuck.)

schedule was called. I wanted to go to the hotel and change so I would be ready for my engagement.

Q. You say he was eight minutes late in Deming——

A. The last time I looked at my watch.

Q. Did you keep your eye on your watch from then on until the time of the accident? A. No.

Q. You did not? A. No.

Q. But you say that he was on his schedule at the time of the accident.

A. I observed the time that my watch had stopped; it was broken by the impact. [51]

Q. You say he was on time at the time of the accident? A. Yes, sir.

Q. Although he had not arrived yet at Deming—I mean arrived at Las Cruces, is that right?

A. I believe there was ten minutes more to go to Los Cruces. He was eight miles from Las Cruces, that put him on time.

Q. You don't know if he was on time at the time of the accident; you are doing it by deduction.

A. My watch was knocked out. It was crushed at the time I was thrown to the floor.

Q. You say before the time of the accident you were reading and not paying attention to the road and surrounding circumstances?

A. I have made the trip so many times I was perfectly relaxed.

Q. You were perfectly relaxed?

A. Yes, sir.

Q. There was nothing in the operation of the bus

(Testimony of Viola B. Tuck.)

that caused you any fear, anxiety or anything of that sort, was there? A. No, sir.

Q. No unusual operation of any kind, is that right?

A. No, the road dipped and I was used to that.

Q. And then you say that at this time while you [52] were perfectly relaxed and reading, you felt a jar.

A. I felt a jar and was thrown forward immediately as soon as the brakes were applied, I was thrown to the seat in front of me.

Q. Before the time of this jar, this first jar, you had never seen this Ford Coupe?

A. I had been reading, Mr. Baker. I had no reason to look up.

Q. You say then that you felt this jar and was thrown forward? A. Yes, sir.

Q. And then looked up? A. Yes, sir.

Q. You saw this Ford Coupe coming; it was a Ford Coupe, wasn't it?

A. I couldn't tell whether it was a coupe or not.

Q. Let us call it a coupe. A. A Ford car.

Q. You saw the Ford car for the first time?

A. Yes, sir.

Q. And that was after Mr. Bach had apparently applied his brake, is that right? A. Yes, sir.

Q. At that time you say—I believe you testified that this Ford was coming directly at the bus?

A. It was on the bus' side of the road. [53]

Q. I believe you testified it was coming directly at the bus? A. Yes, sir.

(Testimony of Viola B. Tuck.)

Q. It was on the bus' side of the highway?

A. Yes, sir.

Q. How far was that Ford from the bus at that time?

A. Far enough so that I could see the entire car.

Q. Well, could you estimate then how far that was; thirty feet, forty feet?

A. The length of the courtroom (indicating).

Q. What? A. The length of the courtroom.

Q. You say the length of this courtroom. That is your estimate? A. Yes.

Q. But you judge it mostly by the fact you could see the entire car, is that right?

A. Considering that two seats in front of me, the driver's seat and over out through the steering wheel and out through the window.

Q. In other words, this bus was high, higher than the Ford car? A. Yes, sir.

Q. And there were seats in front of you?

A. Two, two seats.

Q. Two seats. [54]

A. And no one sitting in them.

Q. Did you keep your eye on that Ford car from that moment on?

A. Mr. Baker, it was coming head on. There wasn't a fraction of a minute.

Q. Just answer my question. A. Yes, sir.

Q. Just answer the question. Did I understand you; did you keep your eye on that Ford car from the time you observed it until the time of the impact?

A. Until I went down on the floor.

(Testimony of Viola B. Tuck.)

Q. That was the final impact, wasn't it?

A. Yes.

Q. The Ford car kept coming straight on into the bus?

A. No, sir.

Q. What did it do?

A. It turned sharply to the left.

Q. It turned sharply to the left?

A. Yes, sir.

Q. And the driver was pulling to his right, wasn't he?

A. Yes, sir.

Q. At the moment you felt the first impact, in other words the first application of the brakes, was the driver then pulling his bus to the right? [55]

A. Very slightly.

Q. And he continued to pull it to the right, didn't he, from then on?

A. I couldn't say.

Q. You know when the impact occurred, don't you?

A. Yes, sir.

Q. That was practically almost off the pavement, wasn't it?

A. Yes, sir.

Q. So, he did continue to pull to the right, you know that, don't you?

A. Yes, sir.

Q. Now, I believe you stated that you first saw Mr. Bach lying out on the road?

A. Not on the road, in the borrow pit.

Q. This bus did end up on the borrow pit at the edge of the shoulder?

A. Yes.

Q. This road has paving, a dirt shoulder and borrow pit?

A. Yes.

Q. And the bus was in the borrow pit when it come to a stop?

(Testimony of Viola B. Tuck.)

A. It was practically in there because it was at an angle.

Q. You say you saw Mr. Bach lying in front of the [56] bus? A. Yes.

Q. In a prone position? A. Yes.

Q. Did you go out to see him?

A. I didn't get out of the bus until all the passengers were off. I didn't go out to see Mr. Bach. There was no front of the bus.

Q. You talked to him from the bus?

A. Yes, sir.

Q. He was still lying on the ground?

A. At the time I talked to him, he had gotten up.

Q. You were still on the bus? A. Yes.

Q. But the whole front of the bus had gone?

A. Yes.

Q. Knocked out?

A. I don't know where it was.

Q. It just wasn't there. His first inquiries were for the passengers, not for himself, but for the passengers?

A. I asked him if there was anything I could do.

Q. And he said, "Are any of the passengers injured?" Is that right? A. Yes, sir.

Q. Then, I believe he told you where the first aid kit was? A. I asked him where it was. [57]

Q. You asked him and he told you? A. Yes.

Q. And then you spent—what would you say, the next thirty minutes taking care of the passengers in the bus?

A. I began to administer aid to them. Somebody

(Testimony of Viola B. Tuck.)

came on the scene with water with cups and they gave them to me for people to take aspirins with.

Q. You were helping the injured?

A. Yes, sir, and also taking the names of the passengers.

Q. Were you still doing that when Captain Salas of the New Mexico Highway Patrol came there?

A. Yes.

Q. You were still in the bus and some of the passengers were there?

A. Some of them had started to get out.

Q. Some had started to get out? A. Yes.

Q. And you didn't get out of the bus until Captain Salas was there?

A. No, sir, I didn't get out.

Q. When you say you observed the skid marks, that was after Captain Salas had arrived, is that right? A. Yes, sir.

Q. And you stated you got out of the bus. Did you [58] make an observation as to the point of impact?

A. After walking around a while, I walked up the highway.

Q. You could see where the Ford and the bus had collided; it was plainly evident? A. Yes, sir.

Q. Where were the left-hand wheels of the bus at the time of the impact with reference to—that would be the south side of the pavement, isn't it? The highway there runs east and west?

A. It is hard to tell; it is not due east and west.

(Testimony of Viola B. Tuck.)

Q. In a general direction, was it running east and west there? A. Yes.

Q. That would be the south side of the pavement. In other words, the right-hand side of the pavement would be the south side of the pavement.

A. Yes, sir.

Q. Where were the left-hand wheels of the bus with reference to the south edge of the pavement?

A. They were on the pavement.

Q. How far on the pavement?

A. I don't know the width of the bus. I would say three to four feet.

Q. Where were the right-hand wheels of the bus at that time? [59] A. On the shoulder.

Q. Off the pavement? A. Yes, sir.

Q. That is at the time of impact?

A. Yes, sir.

Q. And you state that after all—either before or after, whenever it was that you made the observation, the point of impact—you made an observation of skid marks left by this bus?

A. I walked on up the highway.

Q. You say there were skid marks for 300 feet from the point of impact? A. No, sir.

Q. You said one city block. What did you mean by a city block?

A. I didn't say there were skid marks. I said when the brakes were applied to the point of impact. I didn't say skid marks extended that far.

Q. What do you call a city block; 300 feet?

A. Well, taking the length of the courtroom

(Testimony of Viola B. Tuck.)

again, I would say it was four times the length of this courtroom.

Q. Four times the length of this courtroom?

A. Yes, sir.

Q. Did you observe where the bus was after it came to a stop? [60]

A. Yes, sir.

Q. You examined the same?

A. Well, I don't know what you mean by examining; the bus?

Q. Well, you looked it over, didn't you?

A. I saw the front of the bus.

Q. You know what the whole picture there looked like?

A. Yes.

Mr. Baker: Will you mark these for identification (indicating).

The Clerk: These are marked for identification Defendant's Exhibits A, B, C and D.

(Thereupon the above referred to photographs were marked for the purpose of identification as Defendant's Exhibits A, B, C and D.)

Q. I hand you Defendant's Exhibit A marked for identification and ask you to look at that photograph please, Mrs. Tuck (indicating). Do you recognize that?

A. I can't say that is the wreck.

Q. You can not say? A. No.

Q. You don't recognize that. That looks generally like the highway?

A. Yes, sir.

Q. And the surrounding territory there? [61]

(Testimony of Viola B. Tuck.)

A. Yes.

Q. Handing you Defendant's Exhibit B for identification, I will ask you to look at that particularly with the car underneath the bus (indicating).

A. That looks like it as I can remember.

The Court: What is that?

A. That looks like it as I can remember.

Mr. Baker: We offer Defendant's Exhibit B in evidence.

Mr. Carlton: No objection.

The Court: Exhibit B may be admitted.

The Clerk: That is Defendant's Exhibit B in evidence.

(Thereupon the above referred to photograph having been marked for the purpose of identification as Defendant's Exhibit B was received in evidence.)

Q. I hand you Defendant's Exhibit C, marked for identification, and ask you to examine that, please (indicating). A. Yes, sir.

Q. Do you recognize that? A. Yes, sir.

Q. That was the wreck that you were referring to? A. I believe it was.

Mr. Baker: We offer it in evidence.

Mr. Carlton: No objection. [62]

Mr. Baker: This will be what, Mr. Clerk?

The Clerk: Defendant's Exhibit C in evidence.

(Thereupon the above referred to photograph having been marked for the purpose of identification as Defendant's Exhibit C was received in evidence.)

(Testimony of Viola B. Tuck.)

Q. I hand you Defendant's Exhibit D marked for identification, Mrs. Tuck, and ask you to examine that (indicating). A. Yes.

Q. You recognize that? A. Yes.

Q. As the wreck in question? A. Yes.

Mr. Baker: We offer this in evidence.

Mr. Carlton: I have no objection.

The Clerk: Defendant's Exhibit D in evidence.

The Court: It may be received.

(Thereupon the above referred to photograph having been marked for the purpose of identification as Defendant's Exhibit D was received in evidence.)

Mr. Baker: This one is for identification (indicating).

Mr. Carlton: I think we will agree that is the scene.

Mr. Baker: All right, then, we will offer [63] Defendant's Exhibit A marked for the purpose of identification.

The Court: It may be received in evidence.

The Clerk: Defendant's Exhibit A in evidence.

(Thereupon the above referred to photograph having been marked for the purpose of identification as Defendant's Exhibit A was received in evidence.)

The Court: Do you gentlemen want a recess at this time or do you want to go through to the noon hour?

Mr. Baker: I would appreciate a recess.

(Testimony of Viola B. Tuck.)

The Court: You want a recess. Gentlemen, we are about to take a recess of five minutes and I admonish you not to discuss this case amongst yourselves or with anybody else or discuss the case in anybody else's presence. Furthermore, I admonish you not to express any opinion on the merits of this case until the case is finally submitted to you for deliberation. We will now stand at recess for five minutes. You can continue your inspection of the exhibits after recess.

(Recess had.)

The Court: Is it stipulated that all the Jurors are present? Do we have a stipulation that all the Jurors are present?

Mr. Baker: Oh, yes. [64]

Mr. Carlton: Yes, sir.

The Court: You may proceed, Mr. Baker.

Q. Mrs. Tuck, I believe you said that this exhibit you could not particularly identify, is that right? (Indicating.)

A. I don't recall seeing it from the rear.

Q. You don't recall seeing it from the rear end?

A. No, sir.

Q. And you filed suit against the Pacific Greyhound Lines for recovery, if any? A. Yes, sir.

Mr. Baker: That is all.

Re-direct Examination

By Mr. Carlton:

Q. Mrs. Tuck, has the case been disposed of, your case?

(Testimony of Viola B. Tuck.)

Mr. Baker: We object to it; wholly immaterial and irrelevant.

Mr. Fowler: Mr. Baker opened the door.

Mr. Baker: No, he asked it on direct examination, whether she filed a suit.

Mr. Fowler: He opened the door, if the Court please, on cross-examination.

The Court: Well, there was a reference made to the filing of the suit. I think the question arose, "Why did you file suit?" [65]

Mr. Baker: No, they asked her first if she had filed a suit. And that is all I asked.

The Court: To which there was an objection, "Why did you file suit in El Paso?"

Mr. Baker: Started to ask her and I objected to it.

The Court: Your question does not open it up; objection overruled.

Q. Mrs. Tuck, you testified on cross-examination about somebody coming and bringing some water and cups? A. Yes, sir.

Q. Do you know in what direction that car came?

A. The car came from Las Cruces.

Q. Do you know whether or not it was the first car that came, or was there any other one that came before it did?

A. That was the first car that came on the wreck; gave me a bottle of water and paper cups and turned back to Las Cruces.

Q. That was before Captain Salas came?

A. Yes, sir.

(Testimony of Viola B. Tuck.)

Q. Mrs. Tuck, you said that you went to the front of the bus to get the emergency kit?

A. Yes, sir.

Q. First aid kit? A. Yes, sir. [65]

Q. Had the sun set at this time?

A. No, sir, the sun had not set. It was on the horizon.

Q. In what direction was the sun with regard to the highway?

A. Directly down the highway, west.

Q. And a car going west, would it have been facing the sun? A. Straight into the sun.

Q. Did you see the sun; did you make notice of the sun immediately after the accident or was it sometime after that before you noticed the sun?

A. Just as I went to break off the first aid kit, because I was blinded by the sun in pulling off the kit.

The Court: Repeat that over again; I cannot hear you.

Q. Say it over again.

A. In pulling off the first aid kit, which hangs on the driver's side, below his window, my face was directly into the sun.

Mr. Carlton: Take the witness.

Re-Cross-Examination

By Mr. Baker:

Q. Where was this first aid kit; which side of the bus? [67] A. On the driver's side.

Q. That would be the left-hand side?

A. Yes.

Q. On the side of the bus or the front?

(Testimony of Viola B. Tuck.)

A. Yes, sir.

Q. On the front?

A. It wasn't on the front; it was on the side.

Q. It was on the side?

A. It would have been right opposite the driver's seat.

Q. Right opposite the driver's seat?

A. Yes.

Q. When you went to take off that first aid kit, you were facing directly into the sun?

A. The sun was directly on the side of my face.

Q. Directly on the left-hand side?

A. I was bending down. The whole side of the bus was turned down. I had to lean over, the sun was right to the left of my face.

Q. Right to the left of your face? A. Yes.

Mr. Baker: That is all.

Mr. Carlton: That is all.

The Court: You may step aside. [68]

Mr. Carlton: If the Court please, I will call Captain Salas.

CAPTAIN C. J. SALAS,

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Carlton:

Q. Please state your name.

A. C. J. Salas.

Q. Where do you live, Mr. Salas?

(Testimony of Capt. C. J. Salas.)

A. Las Cruces, New Mexico.

Q. What is your business or profession or employment? A. State Police.

Q. Are you a New Mexico state policeman?

A. New Mexico State Police, yes, sir.

Q. How long have you been a state policeman?

A. Fifteen years and three months.

Q. What is your rank? A. Captain.

Q. Were you living at Las Cruces and stationed in that area on or about the 25th day of March, 1946? A. I was.

Q. Captain, do you recall an accident or collision between a Ford automobile and a Greyhound bus out on Highway 80, west of Las Cruces, in the late afternoon of the 25th of March, 1946? [69]

A. I do.

Q. And did you go out there?

A. Yes, I did.

Q. Do you know who notified you of this accident? A. I was notified by telephone.

Q. And in consequence of that telephone message, did you go out there? A. I did.

Q. About what time was it that you arrived there? A. Six twenty-five.

Q. How far would you say it is from Las Cruces to the point where this accident occurred?

A. Nine miles.

Q. When you got out there, what did you find?

A. I found a Greyhound bus and Ford car and

(Testimony of Capt. C. J. Salas.)

several other cars around at the scene of this accident.

Q. Captain Salas, I hand you Defendant's Exhibit A, and I will ask you to state if you know, or recognize the picture, state what it is (indicating).

A. That is a picture shown of a Greyhound bus, boom truck, coupe and several other vehicles.

Q. That were gathered at the scene of the accident?

A. That were gathered at the scene of the accident.

Q. Captain Salas, did you make those pictures or were they made under your supervision or direction?

A. I don't know about these pictures. I have some [70] pictures taken of my own, at my direction, and I would like to compare them with these.

Mr. Baker: I have no objection; compare them, Captain.

Q. Compare all of them while you are at it, Captain.

A. I don't have this picture here. I don't know where that was taken. This is my picture here showing my police car, myself, the boom truck and the Greyhound bus.

Q. I hand you Defendant's Exhibit C and I will ask you to state what that is, if you know (indicating).

A. That is a Ford car and the front end of a Greyhound bus.

(Testimony of Capt. C. J. Salas.)

Q. Was that picture made by you under your supervision or direction? A. Yes, it was.

The Court: Which picture are you referring to?

Mr. Carlton: Exhibit C, Defendant's Exhibit C.

The Court: All right.

Q. Captain, I hand you Defendant's Exhibit D, and I will ask you to state what that is (indicating).

A. That is the side view of the Ford car, the remains of the Ford car, and the front end of a Greyhound bus.

Q. Was that picture made by you under your supervision or direction (indicating)? [71]

A. It was.

Q. Captain, I hand you Defendant's Exhibit B and I will ask you to state what that is (indicating)?

A. That is the left side of a Greyhound bus and the remains of a wrecked car underneath the bus.

Q. And that correctly represents the situation as you found it and saw it? All these you identified correctly represent the situation as you found it and saw it out there on that occasion (indicating)?

A. Yes, sir.

Mr. Baker: He hasn't identified our A. If he wants to testify about that, you can introduce it; that is your exhibit. It is the same thing except taken at a different moment.

(Testimony of Capt. C. J. Salas.)

Mr. Carlton: Do you have any objection to this (indicating)?

Mr. Baker: No.

Mr. Carlton: Mark this as Plaintiffs' Exhibit 5 for identification, and it is entered by agreement as an exhibit.

The Clerk: You are offering it in evidence by agreement?

Mr. Carlton: Offer it in evidence by agreement.

The Clerk: Plaintiffs' Exhibit 5 in evidence (indicating). [72]

(Thereupon the above referred to photograph having been marked for the purpose of identification as Plaintiffs' Exhibit 5 was received in evidence.)

Q. Captain Salas, did you make an investigation of the wreck and the facts surrounding it that evening, while you were there? A. I did.

Q. Did you get out there before the sun set?

A. It was still light. I believe the sun hadn't quite set when I arrived at the scene of the accident.

Q. Captain, were you able to tell and determine where the point of impact was between the two vehicles?

A. It was on the south edge of the pavement.

Q. Could you tell whether or not the Ford was entirely off of the pavement or was the bus entirely off of the pavement at the time of the impact?

A. The Ford appeared to be off of the pavement from physical marks on the ground.

(Testimony of Capt. C. J. Salas.)

Q. Would you say that the front end of the bus was entirely off the pavement at the time of the impact? A. The front end was.

Q. What would you say about the back end?

A. The back end was not entirely off the pavement.

Q. Were the wheels on the right, the right rear wheels, were they off the pavement?

A. There were no tire marks showing that they were [73] on or off at the time.

Q. How far on the pavement would you say the left rear wheels of the bus was?

A. Approximately four feet.

Q. Captain, when the bus finally came to a stop, did the position which you found it in, when you arrived there, was it entirely off of the pavement and off the shoulder?

A. It was entirely off the pavement, parallel with the highway.

Q. Parallel with the highway?

A. Yes, sir.

Q. Was it in the borrow pit? A. Yes.

The Court: I didn't get that question and answer.

A. It was parallel with the pavement in the borrow pit.

The Court: The "bar pit" is what you referred to?

Mr. Baker: It is technically called "borrow pit."

Mr. Fowler: It comes from borrowed pit.

(Testimony of Capt. C. J. Salas.)

The Court: How do you spell that?

The Witness (spelling): B-o-r-r-o-w pit.

The Court: It is alongside of a shoulder?

The Witness: Yes.

Mr. Carlton: It is from where they took the dirt [74] to build up the side of the road. They "borrowed" the dirt, and that is why they called it the "borrow pit."

Q. Did you make an examination of the bus, and do the pictures that have been introduced here, to which you have testified, do they correctly represent the location of the bus and the condition of the bus at the time you arrived? A. Yes.

Q. Captain, you say that you were able to tell this spot where the impact was. Did you make any measurements to determine how far the bus traveled from the point of impact?

A. 144 feet.

Q. Did you measure that? A. I did.

Q. Was Bach up and around when you arrived, or still on the ground?

A. He was around the bus there, around the passengers there.

Q. Do you know George Rumeh now, don't you?

A. Yes.

Q. You didn't know him prior to that night?

A. No, sir.

Q. Did you see him there when you arrived?

A. There were several people; I couldn't tell who [75] was there and who was not; I couldn't tell.

(Testimony of Capt. C. J. Salas.)

Q. You don't remember seeing him there that night?

A. No, we sent some people in on an ambulance that were hurt, and the rest of the passengers that were hurt, we sent them in on another bus, into Las Cruces into the hospital.

Q. These pictures were made or there were pictures made that evening, after dark? These are flashlight pictures (indicating)? A. Yes.

Q. Several hours after the accident?

A. It was approximately ten o'clock when those pictures were taken.

Q. Referring to the persons that were on the ground in front of the bus at the time you arrived, how far would you say that the farthest person was from the bus out in front?

A. They was two people, man and his wife, which I learned was Mr. and Mrs. Frances, that was about 25 feet ahead of the bus and the car. There was another person lying ahead of them about approximately ten feet difference.

Q. Farther than they were? A. Yes.

Q. Is it your testimony, Captain, that Mr. and Mrs. Frances were a 169 feet from the point of impact? [76]

Mr. Baker: Just a minute; I was talking. Will you read that last question?

(Last question read by the Reporter.)

Mr. Baker: 169 feet?

Q. 144 plus 25?

(Testimony of Capt. C. J. Salas.)

A. Yes, that would be right.

Q. And that there was some other person that would be 179 feet from the point of impact?

A. Yes, sir.

Q. Captain, did you talk with Cody Bach that evening out there? A. I did.

Q. Did you make out an accident report?

A. I did.

Q. And do you have the report that you made out with you?

A. I have a copy of the accident report I submitted.

Q. Is this copy that you have, the copy that you made yourself? A. Yes, sir.

Q. And has it been in your possession all the time since you made it? A. Yes, sir.

Q. Did your report show what distance the bus driver apprehended the danger? [77]

Mr. Baker: Just a minute. If the Court please, we object to that as being wholly immaterial and purely self-serving, what he had down in the report.

Mr. Carlton: Withdraw the question.

Q. In consequence of what Captain Salas told you, did you fill out that report? I mean, Captain Salas, in consequence of what Mr. Bach told you, did you fill out the blanks on that report?

A. I did.

Q. Now, then, what distance does your report show that the driver of the bus apprehended the danger?

Mr. Baker: We object to that as being wholly

(Testimony of Capt. C. J. Salas.)

immaterial and irrelevant. What he put down in the report does not make any difference at all.

The Court: He can refresh his recollection from his report.

Mr. Baker: That doesn't make any difference, what his report said.

The Court: He can testify to what he observed out there and refresh his recollection if he has any notes.

Mr. Baker: That is true, but that is not what he is asking him. He is asking what his report shows, not asking him to refresh his recollection.

Q. Captain Salas, to refresh your recollection, you [78] may examine your report to see how far did the driver observe the danger before——

Mr. Baker: Just a minute; if the Court please, Captain Salas was not there at the time of the accident. He can't testify to such a thing.

The Court: That is calling for a conclusion; that is objectionable.

Q. What did Bach tell you on that subject?

Mr. Baker: Just a minute. That is not a proper impeaching question, if that is the purpose of it. That is not the proper way to impeach him.

Mr. Fowler: It isn't for the purpose of impeachment, if the Court please; it is an admission of an adverse witness.

Mr. Baker: He has not been adverse now.

Mr. Fowler: He is the driver of the bus. It is admissible in interest against Mr. Bach and the Pacific Greyhound Lines.

(Testimony of Capt. C. J. Salas.)

Mr. Baker: You mean any statement of Mr. Bach at that time?

Mr. Fowler: That might be adverse.

The Court: If the statements were made at the time——

Mr. Fowler: At the time it is part of the res gesta.

The Court: I don't know; I wouldn't say about that. This is how long after the accident?

Mr. Carlton: If the Court please, the testimony has been that the accident took place at 6:10, and that he arrived there at 6:25.

The Court: And this statement is on the part of the bus driver, is that it?

Mr. Baker: That is what he is asking for.

The Court: I don't know why——

Mr. Baker: May I ask a few questions on voir dire.

The Court: Yes.

Voir Dire Examination

By Mr. Baker:

Q. What was Bach's condition at the time you got there?

A. He was walking around; complained of a chest injury and I believe the ankle was hurting him.

Q. What was his mental condition?

A. Well, I couldn't say as to that. I didn't examine him.

Q. Well, were his activities such, would you say, that he was under shock at that time?

(Testimony of Capt. C. J. Salas.)

A. Well, he was to a certain extent. He was very much concerned about the accident.

Q. And didn't he insist upon his staying there over your objections? [80]

A. He wanted to stay there when I loaded all the passengers on the other bus.

Q. And made him go to the hospital?

A. Made him go with the driver of this other bus.

Q. In your opinion, his condition was such that he should be sent to the hospital?

A. I wanted to see everybody go to the hospital.

Mr. Baker: We will object on the ground that it wouldn't have any probative force.

The Court: Assuming that he is a representative of the defendant, it seems to me that would be competent evidence.

Mr. Fowler: It wouldn't go to the admissibility, only to the credibility; that is the only question before the Court.

The Court: Objection overruled.

Further Direct Examination

By Mr. Carlton:

Q. All right, state what Mr. Bach told you about the distance that he observed the danger.

Mr. Baker: Just a minute; that calls for a conclusion. You talk about danger. That is not a proper question.

The Court: Objection sustained.

Q. Did you ask him how far he was from the danger at the time he first saw the—— [81]

(Testimony of Capt. C. J. Salas.)

Mr. Baker: We object to that. That question is calling for a conclusion.

The Court: When you state "danger," you are asking for a legal conclusion.

Mr. Carlton: That's right.

The Court: Reframe your question.

Q. Did he estimate how far it was that he apprehended the danger?

Mr. Baker: The same objection, if the Court please. This definitely is calling for legal conclusions of the witness.

The Court: The use of the word "danger" is objectionable in my opinion.

Q. Then I will change the question to say: how far was he when he first observed the oncoming car? A. About three hundred feet.

Q. Did he state to you what the oncoming car was doing that attracted his attention?

A. It was coming down the side of the—on his side of the highway, angling toward him when he first noticed it.

Q. Did you ask Mr. Bach at what speed he was traveling at the time? A. I did.

Q. And what did he tell you?

A. The usual speed. [82]

The Court: What did you say?

The Witness: The usual speed.

Q. Did he give any definite statement as to his speed?

Mr. Baker: Objection to that; trying to lead his witness. He already testified to "the usual speed."

(Testimony of Capt. C. J. Salas.)

Mr. Fowler: Another speed, if the Court please.

The Court: You may ask him if he said anything further.

Q. Did he say anything further on the subject of speed?

A. He stated when he observed this car coming on his side of the road, he started to slow down and pull to the right.

Q. Started to slow down and pull to the right?

A. Yes.

Mr. Carlton: Take the witness.

Cross-Examination

By Mr. Baker:

Q. Captain, Mr. Bach told you that as soon as he observed this car, he started to pull to his right?

A. Yes, sir.

Q. When you got there, arrived at the scene of the accident, what is the first thing you did, Captain Salas? [83]

A. I cleared the road for the ambulance to load these injured passengers on, the ones that were on the ground.

Q. There were cars there at the time?

A. Yes, there were cars parked all over the highway.

Q. Do you have Plaintiffs' Exhibit 5, I believe it will be. Then what is the next step you took, Captain?

A. I got—I talked to Mrs. Tuck as one of the witnesses on the bus.

Q. Where was she, in or outside the bus?

(Testimony of Capt. C. J. Salas.)

A. When I talked to her, she was outside the bus.

Q. Then what else did you do?

A. I also talked to Sergeant Boone.

Q. Outside of talking to people, what else did you do?

A. Then on, I saw that all passengers were loaded in this other bus that arrived in the meantime; checked for the baggage of the different passengers and cleared the scene of the accident.

Q. How long was it before you started making measurements in your observations at the scene of the accident?

A. As soon as we cleared the passengers out, I took my measurements. [84]

Q. You say you could clearly determine the point of the impact? A. Yes, sir.

Q. I am handing you Defendant's Exhibit A, Captain Salas, and also Plaintiffs' Exhibit No. 5 (indicating). You caused Plaintiffs' Exhibit No. 5 to be taken? A. Yes, sir.

Q. You compare the two and see if there is any difference outside of the fact that there were different cars, different people standing there.

A. That is the only difference.

Q. That is the only difference. Insofar as the condition of the highway is concerned, any marks, they are all the same? A. Yes, sir.

Q. With that in mind, let us use Plaintiffs' Exhibit A to aid in that it is larger and easier to be seen. And will you point and turn to the Jury

(Testimony of Capt. C. J. Salas.)

so that they can see. Show the point of impact between the Ford and the bus.

A. It was right in here, at the end of the pavement (indicating).

The Court: Will you mark that?

Q. Is there a black mark to indicate it, the black mark on the pavement?

A. The black mark on the pavement is a tire skid [85] mark.

Q. Point that out, please.

(Thereupon, the witness followed instruction.)

Q. That is a tire skid mark? A. Yes.

Q. Right on the edge of the pavement?

A. Yes.

Q. Was that the point of impact?

A. Right on the edge, further off the pavement, where the impact was.

Q. How far is that skid mark?

A. Just on the edge of the skid mark.

Q. How far was that from the south edge of the pavement, the point of impact?

A. The point of impact was right at the edge of the pavement.

Q. Right at the edge of the pavement?

A. Right at the south edge of the pavement.

Q. This skid mark was how long?

A. I didn't measure that skid mark there.

Q. Would you estimate how long it was?

A. It was about five feet long.

(Testimony of Capt. C. J. Salas.)

Q. That was your estimate? A. Yes, sir.

Q. The skid marks pretty closely indicate the scene—the exact point of impact, doesn't it? [86]

A. Yes—no, it shows where the tire skidded there. The impact was right at the end of the pavement.

Q. You are pointing now at the edge of the pavement? A. Yes.

Mr. Baker: Will pen show?

Mr. Carlton: No.

Q. Mark with an "X" the point of impact.

(Thereupon, the witness followed instructions.)

Q. And does that also indicate the edge of the pavement? A. Yes.

Mr. Baker (addressing the Jury): Can you gentlemen see that blue mark?

Q. So that blue "X" indicates exactly where they collided?

A. The point of impact, yes, sir.

Juror Phillips: May I ask a question: the edge of the left side of the bus or the right of the bus?

Mr. Baker: I will clear that up in a few minutes.

The Court: Just a moment; did you say something?

Mr. Fowler: I want to say, if he knows; it is a matter of argument for the Jury.

The Court: Yes.

Q. From your observations there, could you de-

(Testimony of Capt. C. J. Salas.)

termine [87] whether or not the left front wheel of the bus was on or off the pavement?

Mr. Baker (addressing the Juror): I think that is what you wanted to know?

The Court: Is that your question?

Mr. Baker: Yes.

A. It would be hard to tell whether the left wheel was on the pavement at the time, on account of the bus's front wheel set further back than the front end of it.

Q. But would the left front wheel of the bus have been very close to the edge of the pavement?

A. Yes.

Juror Phillips: Would the skid marks be made by the left front wheel or——

A. It shows on this picture tire marks back of that skid mark where the brakes were being applied, but they weren't skidding. From the edge of the pavement to where it stopped, the wheels were turning. It showed on the dirt the wheels were turning. The marks where the car as being dragged at the head of the bus (indicating).

Q. At the time of impact, could you locate or determine the rear of the bus, estimate where it was?

A. Part on the pavement.

Q. Part off? [88]

A. You couldn't tell what angle it was coming off the pavement.

Q. You couldn't tell; part of it was off of the pavement?

A. Part off.

(Testimony of Capt. C. J. Salas.)

Q. Part off and part on the pavement, the rear? A. Yes.

Q. As to the front end of it, not off the pavement, was on the pavement, the left front wheel?

A. Yes.

Q. The skid mark that is shown on the picture is only about five feet long?

A. That's right.

Q. That indicated—could you tell whether it was made by the bus or by the Ford?

A. It was made by the bus.

Q. Did you make any examination to determine whether the Ford had ever applied its brakes or attempted to stop its car?

A. No skid marks showed on the pavement from the other car whatever.

Q. No marks whatever from the Ford car?

A. No.

Q. From your experience as a highway patrolman, would you say that Ford car ever applied its brakes or ever made an attempt to stop? [89]

A. I couldn't say as to that; that is one thing we will never know.

Q. At least you found no indication on the highway whatever? A. No.

Q. That that Ford car ever made an attempt to stop? A. No, sir.

Q. I believe you identified these other three pictures which are Defendant's Exhibits B, C, and D in evidence, Captain Salas (indicating).

A. Yes, sir.

(Testimony of Capt. C. J. Salas.)

Q. From those pictures and from your observation at the time at the scene of the accident, what was the condition of the front end of the bus caused by the impact?

A. It was all carried underneath the bus.

Q. Did he have any brakes whatever after the impact? A. No, sir.

The Court: Did who?

Mr. Baker: I mean the bus.

A. I don't think he had any brakes because the wheels were rolling on the dirt.

Q. From the condition of the front end of the bus, would you say that all his brakes were knocked out by the impact?

A. When that took place, all his brakes were knocked [90] out.

Q. When I refer to that, I refer to the driver of the bus; all his brakes were knocked out?

A. Yes.

Q. After the impact it rolled free?

A. Yes. From the point of impact to the front end of the bus, it was 144 feet.

Q. It was rolling free without any brakes?

A. Yes.

Q. What was the weight of that bus?

A. I was told it was 18,000 pounds.

Q. From your own experience, you know what those weights are? A. Yes.

Q. That is an 18,000 pounds bus?

A. Yes. I asked the weight of the bus.

Q. Was that unladen?

(Testimony of Capt. C. J. Salas.)

A. That is empty weight.

Q. Do you know what the weight of that Ford car was?

A. It is of about 3100 pounds; 3100, 3200 pounds.

Q. That is the approximate weight of a Ford car?

A. Yes, that is unladen weight.

Q. Unladen weight on the Ford? A. Yes.

Mr. Baker: I think that is all. [91]

Mr. Carlton: If the Court please, I would like to ask another question of the Captain.

The Court: You may.

Redirect Examination

By Mr. Carlton:

Q. Captain, how wide is the pavement at that point? A. Twenty-one feet.

Q. How wide are the shoulders?

A. Six feet on each side before they start sloping.

Q. What is the character of the materials used in making those shoulders?

A. Well, they use caliche and gravel.

Q. Captain, what was the speed limit in New Mexico on the 25th day of March, 1946?

A. Forty-five miles per hour.

Q. State whether or not there are signs posted on that highway between Las Cruces and Deming announcing the speed limit? A. There are.

Q. Do you know what those signs state?

A. "Forty-five miles per hour for your protection."

Mr. Carlton: That is all.

The Court: Come down, Captain.

You require this witness any further?

Mr. Baker: Yes, we may.

Mr. Carlton: Would the Court care for me to put [92] on another one? I am ready if you——

The Court: Well, we can continue for ten minutes longer.

Mr. Carlton: Lieutenant Jones, come up please.

The Court: Unless the Jury is getting hungry.

Mr. Baker: My high blood pressure can continue.

LIEUTENANT HOWARD JONES,

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Carlton:

Q. Please state your name.

A. Howard Jones.

Q. Where do you live, Mr. Jones?

A. El Paso, Texas.

Q. What is your business, occupation or profession?

A. I am a traffic engineer, engineer and safety director in the El Paso Police Department.

Q. How long have you held that position?

A. For the past two years.

Q. What is your rank in the El Paso Police Department?

A. I am a Lieutenant.

(Testimony of Lieutenant Howard Jones.)

Q. What preparation have you had for the particular work that you are doing?

A. I am a graduate of Northwestern University [93] Traffic Institute.

Q. When did you graduate?

A. I graduated June 19, 1946.

Q. Lieutenant Jones, explain to the Jury just what your duties are and what is meant by your job and title.

A. In traffic engineering I work rather closely with our Accident Prevention Bureau and do most of the statistical, analytical work in that division, and I also do their technical work, such as skid marks formulas and things pertaining to that, and braking distances of automobiles. I figure those formulas out for them.

Q. That is the formula or science of rule by which the speed of automobiles can be determined, based on the skid marks?

A. Yes, sir, there is.

Q. Did you study that in Northwestern?

A. Yes, sir.

Q. That was a course that you took at Northwestern University? A. Yes, sir.

Q. Is there a rule by which you are able to determine how far and what distance a given car would stop at a given speed? A. Yes, sir. [94]

Q. Lieutenant, what did you mean—what is meant by the term “braking efficiency”?

A. “Braking efficiency” means the amount of heat that is created in a brake drum to bring it up

(Testimony of Lieutenant Howard Jones.)

to the point where the coefficient on the pavement to make the car start skidding and burn rubber.

Q. Can you use any other term instead of "coefficient," so that the Jury might understand?

A. You might term it as "friction" or "resistance."

Q. Is the resistance on the pavement or is it resistance in the drum?

A. Well, sir, the resistance in the drum has to be built up higher than the actual pavement resistance to make the car skid.

Q. When you speak of the resistance efficiency in the drum, is that what you are talking about, braking efficiency? A. Yes, sir.

Q. Explain to the Jury what is meant by "gripping" efficiency.

A. You mean "gripping efficiency" of the pavement?

Q. Yes.

A. Well, the gripping efficiency of any pavement is determined by the amount of energy or force that is created when a vehicle is skidding, divided by the weight of the vehicle. That determines what the frictional resistance of the pavement is.

Q. Do you have figures or estimates by which you measure braking efficiency of the car and gripping efficiency of the road? A. Yes, sir.

Q. In points of difference, suppose that the gripping efficiency on the road was lower than the braking efficiency on the drum, would a car skid?

A. I would like to deal with that more in round figures.

(Testimony of Lieutenant Howard Jones.)

Q. Go ahead and explain, if you understand, so that the Jury can understand it.

A. If the braking efficiency of a vehicle—we will say that the brakes will control seventy-five per cent of the weight of that car, actually that is what the braking efficiency means. If the coefficient friction or frictional resistance on the pavement is eighty per cent, that would be an exceptionally good pavement. If it is concrete, asphalt, macadam, it is good surface. If it is eighty per cent you get enough to skid your vehicle because you would have to create more braking efficiency, higher per cent, to make your vehicle skid.

Q. At any time if you saw your car skid, what does that mean as to the braking efficiency of the car?

A. That means that the braking efficiency of the [96] car is higher than the frictional efficiency of the pavement.

Q. How long have you lived in El Paso, Texas?

A. Over eleven years; just shortly over eleven years.

Q. Are you acquainted with Highway 80 between Las Cruces, New Mexico, and Deming, New Mexico?

A. Generally, yes.

Q. Have you ever been over that highway?

A. Yes, sir.

Q. One time or many times?

A. Quite a few times.

Q. Do different highways, or do the types of

(Testimony of Lieutenant Howard Jones.)

pavement vary as to the griping efficiency of a tire on that surface? A. Yes, sir, they do.

Q. Are you sufficiently acquainted with the character of the road between Deming and Las Cruces approximately eight or nine miles to the west of Las Cruces to the point where you can give us an opinion as to the character of the road, how it would react to brakes?

Mr. Baker: Just a minute; I don't know exactly what he is talking about. Nevertheless, it at least would be wholly immaterial what the road is today.

Mr. Fowler: In March, 1946. [97]

The Court: What time do you refer to?

Mr. Carlton: I will make it March, 1946.

Mr. Baker: If he knows.

Mr. Carlton: If he knows.

A. I couldn't say if I know it as of that date. I was in Northwestern studying at that time.

Q. Would you know it prior to that date?

A. Yes.

Q. What would you say it is now; the same as it was prior to that date?

A. Just about the same.

Q. I think you can answer it. Go ahead and answer it.

A. Well, I would say it is my opinion that that asphalt paving would have a coefficient friction of about seventy-five per cent.

Q. Would that be high or low for pavement?

(Testimony of Lieutenant Howard Jones.)

A. That is considered good.

Q. Then, if there is testimony that the wheels skidded on there, the vehicle by which those marks were made, would have a braking efficiency of higher than seventy-five per cent? A. Yes, sir.

Q. Lieutenant, in your course of study and in preparation for the work that you have been doing, have you qualified yourself to have an opinion or a [98] knowledge of brakes on different kinds of cars?

A. Yes, sir, I have.

Q. Have you studied the mechanical brake?

A. Yes, sir.

Q. The hydraulic brake? A. Yes, sir.

Q. The air? A. Yes, sir.

Q. Would a car, a light car and a heavy car, modern, would it brake at the same time or what would be the difference in which it would brake?

Mr. Baker: Wait a minute; wait a minute: let us—that is wholly unintelligible to me. Does the Court understand it?

Mr. Fowler: Yes.

The Court: Well, reframe your question. I don't quite understand it myself.

Q. Do you now approximately how much a Buick automobile weighs, for instance, a Roadmaster.

A. No, sir, I don't know the approximate weight.

Q. Do you know how much a Chevrolet weighs, a Fleetline?

Mr. Baker: We object to that.

The Court: That is qualifying the witness.

Q. Let me frame the question this way: is this—

(Testimony of Lieutenant Howard Jones.)

[99] suppose a car weighs 4,000 pounds and another car weighs 3,000 pounds, is there a scientific principle used in the building of those cars that would make those cars, regardless of weight, stop in the same distance, or approximately the same distance, under the application of the brake?

A. Yes, sir, there is.

Q. Explain that to the jury, how that is worked out, if you do know; I don't.

A. Well, gentlemen, all of the automotive manufacturers and trailer manufacturers support a fund or Automotive Safety Foundation. This Foundation works out generally most all the safety principles that are incorporated in automobiles, and in doing that they build the brake drums of an automobile that are heavier, they build that brake drum with more square inch of space to compensate for that extra weight which would make that car, regardless of weight, if they were engineered on safety principles, it would make that car, if the car weighed two tons or 20 tons, it would stop the same distance, because the compensation is in the brake drum. They make more surface for the brake drum, which would create more heat in relation to each other.

Q. When you say more area in the brake drum, do [100] you mean that the drum might be larger in circumference, or the brake drum would be wider on the trailer?

A. It might be wider and also the circumference greater.

Q. On a large vehicle of 18 tons, what kind of

(Testimony of Lieutenant Howard Jones.)

drum would you have, a small or large one; what kind of brake drum would you have?

Mr. Baker: The Lieutenant will admit there is no 18 tons on the highway.

Q. 18,000 pounds.

A. Well, as I stated before, the brake drums would have to be built comparable to the weight.

Q. Now, Lieutenant, if the vehicle is equipped with hydraulic brakes, is it built with greater efficiency for braking purposes than if it were mechanical brakes?

Mr. Baker: We object to that; no testimony of hydraulic brakes.

Mr. Carlton: I am testing the witness' knowledge on the matter so that I can qualify him as an expert.

The Court: He may answer as a matter of qualification.

A. Well, as most of you gentlemen know, that the old mechanical brakes were not of adequate force, because they could not create power equally on all [101] drums and create the natural amount of heat to stop.

Mr. Carlton: May I withdraw that question?

The Court: Yes.

Q. I would like to ask you about mechanical and air—

The Court: We will take a recess. Gentlemen, do not discuss this case amongst yourselves or discuss it with anybody else or allow it to be discussed in your presence. Furthermore, you are not to discuss this case until the case is finally submitted to you. We will recess to one-thirty or two o'clock.

Mr. Baker: I prefer two o'clock, if the Court please.

Mr. Carlton: One-thirty; whatever satisfies the Court, we will be back here then.

The Court: How many more witnesses will you complete today?

Mr. Hall: Your Honor, we will have two doctors.

The Court: I think we will come back at 1:45. Court is recessed.

(Thereupon Court adjourned at 12:10 o'clock, p.m., and convened at 1:45 o'clock, p.m.)

Afternoon Session

The Court: Will you gentlemen stipulate that all the jurors are present?

Mr. Carlton: Yes, your Honor. [102]

Mr. Fowler: May it please the Court, two of the jurors spoke to me just now—not about this case——

The Court: They want to vote?

Mr. Fowler: One lives in Tombstone and one in Douglas. They haven't voted. They had to leave there before they could vote. Mr. Baker said it is all right if they want to vote.

Mr. Baker: Your Honor, I have no objection. I don't want to keep them from voting. They may vote Democratic if they like.

The Court: Well, is there any way of telling how much time is required of the witnesses? Can it be possibly finished? We might put our time in profitably by putting in our instructions.

Mr. Baker: I will be glad to do that.

Mr. Hall: Your Honor please, I asked a couple

of local doctors to be here at two. I don't see them here now. I thought we might go ahead here for an hour, perhaps finish this witness and the two doctors, and then I believe these gentlemen would have time enough to go home, if they had cars.

The Court: Who's the juror from Douglas?

The Clerk: He doesn't want to go back. He can't make it.

Mr. Carlton: Who is the other gentleman?

The Clerk: The other gentleman from Tombstone, is that right? You can get there within an hour or [103] two hours?

The Juror: Two hours, safe driving.

The Court: You have got to get there before six?

The Juror: I think about an hour and a half.

The Court: Well, if we let you go by three, can you make it?

The Juror: Four-thirty will be all right for me.

The Court: How can you get there by six?

The Juror: An hour and a half, I can get there.

The Court: As long as the juror from Tombstone doesn't want to go, we can work on till three-thirty and then we can spend our time profitably going over the instructions.

Mr. Carlton: May it please the Court, may I proceed?

The Court: Yes.

LIEUTENANT HOWARD JONES,

a witness called on behalf of the plaintiffs, having been previously sworn, resumed the stand and testified as follows:

Further Direct Examination

By Mr. Carlton:

Q. Lieutenant Jones, I believe I was asking you about hydraulic brakes and air brakes. Are they built on the same theory or what is the theory of the [104] two?

A. Well, they are comparable braking forces. They are just using different substances to stop vehicular movement. The air brake forces the application of the brake and bands shoot against the drum to create friction; and hydraulic brakes, they use oil to accomplish the same purpose. They are both comparable forces.

Q. They would be equivalent under other circumstances?

A. Yes, sir.

Q. Are you acquainted with——

Mr. Carlton: May I have the pictures, please?

Q. I hand you Defendant's Exhibit B and ask you to state what that is (indicating)?

A. Well, apparently it is a bus and demolished automobile.

Q. Are you acquainted with that type of bus?

A. Yes, sir.

Q. Do you know whether that type of bus is equipped with air or hydraulic brakes?

A. I understand they are equipped with air.

Mr. Baker: We object to what he understands, unless he knows.

(Testimony of Lieutenant Howard Jones.)

A. Well, they are equipped with air; no question about it, that is what they are equipped with. [105]

Q. All right. Do you know whether that type of bus is equipped with dual wheels on the rear?

A. Yes, sir.

Q. With dual wheels on the rear, is the braking efficiency increased, will the bus stop quicker and in a shorter distance after the brakes are applied than if it had one wheel on the rear?

A. Well, it would make it stop quicker.

Q. Do you have a formula for working out that matter, the difference between dual wheels and single wheels?

A. No, sir, I don't have the formula.

Q. Do you have a formula for figuring out the distance at which a given vehicle can be brought to a stop if you know the character of the road that it is on and the type of vehicle that it is?

A. Yes, sir.

Q. Explain how that formula works. Now, take your time so that the jury can understand it.

A. Well, gentlemen, we have a formula that we work on that is based on a practical observation. We take a vehicle, any vehicle that has good brakes, on a good road. That doesn't mean the best; say seventy-five per cent of the brakes will control seventy-five per cent of the weight of the car and the same equivalent on the pavement. You can take [106] an automobile, go along, set your brakes to stop, and you will stop and your braking distance is twenty feet. It may vary one foot less or one foot more. That depends on the efficient of the automobile, whether it is higher or down low. We know at twenty

(Testimony of Lieutenant Howard Jones.)

miles per hour the braking distance is twenty feet. That doesn't necessarily mean the car will skid twenty feet on the ground, because it takes a matter of two, three, five feet to create the adequate pressure to cause that car to go sliding; that is including the brake; that is from the time the brake pedal is hit and the vehicle comes to a stop. The physical theory is, that governs that, that the braking distance of the vehicular force as to the square of the speed. By that you can stop at twenty feet at twenty miles per hour, but at forty miles per hour you can not stop at forty feet, because forty miles per hour is twice as fast as twenty miles per hour. So you must square that space. That is, if this goes faster, you would square your 2, which would be 4, that means that it would take you 4 times as long to stop at 40 miles per hour as at 20. Consequently, you would have a braking distance at 80 feet at 40 miles per hour. Should it go up to 60, 60 is three times as fast as 20, and you square your feet and make it 9 and multiply [107] at 20 miles per hour, at 180 feet to stop at 60 miles per hour. It is based on the dissipation of energy. At a given speed of 30 miles per hour, if your car, the energy you create, it makes no difference whether it is a 20-ton vehicle or a 5-ton vehicle, in 20 miles per hour you create energy in that vehicle to raise it directly in the air 20 feet. That is one of the physical facts we base this on.

Q. Is that an accepted brand of the men throughout the country? A. Yes.

Q. Have you qualified in Court as an expert witness? A. Yes, sir, I have.

(Testimony of Lieutenant Howard Jones.)

Q. What courts have you qualified in?

Mr. Baker: We object to that.

Mr. Fowler: Unless you admit his qualifications—

Mr. Baker: I object to that. I don't care how many times or how many courts he has testified in, it wouldn't make any difference what court he testified for or what judge.

The Court: I think he has been qualified.

Q. Mr. Jones, in your study, state whether or not you have a rule covering the time reaction of a driver? A. Yes, we do have. [108]

Q. What is that rule?

A. We have tried many tests by use of mechanical vehicles, such as having a simulated automobile steering wheel, brake pedal, gasoline accelerator, and you have a multiple number of lights on a switchboard, twenty or twenty-five lights and they are worked on a circuit switch, where you can make all these lights come on at one time. All of them are amber and green, one red light. And when that red light comes on, the person who is simulating the driving of the vehicle, takes his foot off and goes on to the brake, and usually we find that to be three-quarters of a second. I have seen one man out of 200 tests that can do it in half a second. They figure the general average is three-quarters of a second to get your foot from the accelerator on to the brake after your mind first thinks it and gets it to your hands and feet.

Q. If a car is driving at the rate of 50 miles per hour, how fast is that car traveling per second?

A. Well, I would have to figure that out.

(Testimony of Lieutenant Howard Jones.)

Q. Could you do it there in a minute, please?

A. Yes, sir, just generally I would say 70 feet per second; that is going into the middle of time.

Q. Three-quarters of a second—if he would travel three-quarters of a second, the driver—— [109]

A. That's right.

Q. In one second's time? A. Yes, sir.

Q. In three-quarters of a second's time—I beg your pardon. Mr. Jones, I believe you said that you are acquainted with the type of bus there that is shown in the Defendant's Exhibit B?

A. Yes, sir.

Q. It is admitted that that bus is equipped with air brakes? A. Yes, sir.

Q. It is admitted that that bus has dual wheels on the rear? A. Yes, sir.

Q. There is testimony to the effect that the brakes on that bus were applied at a distance approximating a city block. The evidence does not clearly indicate that those brakes were held and were applied continuously after they were once applied, but assuming that the brakes were applied at a distance of a city block from the point of impact, do you have an opinion—and the evidence further shows that approximately a city block from where the brakes were applied that there was a collision between a bus that weighed 1,800 pounds and a Ford automobile—18,000 pounds and a Ford that weighed approximately [110] 3,100 pounds and that the Ford was crushed underneath the front of the bus, and that the point of impact was slightly on the pavement, or it might have been just a little off the pavement on a rock and gravel shoulder, and that the bus at the

(Testimony of Lieutenant Howard Jones.)

point of impact carried the Ford with it for a distance of 144 feet. The evidence further shows that after the point of impact, that the driver of the bus and two other persons were thrown approximately 169 feet from the point of impact, and one person was thrown 179 feet from the point of impact. Do you have an opinion, based on that evidence, as to what the speed of that bus was immediately prior to the application of the brakes, in the original application of the brakes?

Mr. Baker: Just a moment.

Q. Now, just "yes" or "no" whether you have an opinion.

Mr. Baker: I want the question read first.

Mr. Carlton: All right.

(Last question read by the reporter.)

Mr. Baker: If your Honor please, we will object to that hypothetical question on the basis that it does not state the facts of the evidence. There is no evidence that the brakes were applied the distance of a city block, which we will assume was 300 feet, to the point of impact, and were kept applied until [111] the time of the impact. No evidence of anybody being thrown a 179 feet from the point of impact. The evidence is that the bodies were found so many feet in front of the bus.

The Court: What difference does it make about these bodies having been thrown? That is not part of the question insofar as the determination of speed was concerned. I don't see that that would make any

(Testimony of Lieutenant Howard Jones.)

difference any more than it would be if this automobile were crushed.

Mr. Hall: It might not have anything to do with the braking efficiency, but the fact that the bodies were thrown 179 feet would be evidentiary of how fast the vehicle was traveling at the point of impact. He is qualified as an expert.

The Court: He is qualified as an expert as to speed, assuming certain factors as stated, the weight of your bus, and assuming, and all of that, and assuming that the brakes were applied.

Mr. Hall: I don't think, so far as I am concerned—we can eliminate that phase of it from the hypothetical question, but I think that the rest of the question is all right. The question was put, that if he had applied his brakes from a city block. We don't contend there is any evidence that he did, but it is our contention that he should have; therefore [112] the hypothetical question is all right.

The Court: I don't think counsel is quarreling with that feature.

Mr. Baker: Yes, there is no evidence that he applied the brakes from a city block and that he kept the brakes applied. There is no such evidence.

Mr. Hall: There is evidence from Mrs. Tuck that the brakes were applied at a city block.

Mr. Baker: And then released.

Mr. Hall: But that is neither here nor there. It is our contention, where would the bus have stopped had he applied the brakes at that point and had he kept the brakes applied until the point of impact. We are not contending that——

(Testimony of Lieutenant Howard Jones.)

Mr. Baker: This question is wholly improper. They might make a proper question from this expert, assuming that they applied the brakes from a certain point and kept the brakes applied, how soon could he have stopped. That is an entirely different question.

Mr. Fowler: That's right.

Mr. Baker: I'm sorry, I tried to correct you.

The Court: I think counsel is correct.

Mr. Fowler: We can eliminate the throwing of the people, if that is objectionable.

Mr. Baker: Then are you going to put a question to him to this effect, or assuming the question that [113] the brakes were applied a city block, 300 feet, and kept applied for 300 feet, and ask him how fast he was going. To answer that question would be 300 miles or 250 or something.

Mr. Fowler: Mr. Baker assumes a city block to be 300 feet. I don't know what a city block is.

Mr. Baker: She said four times the length of this courtroom.

Mr. Fowler: This courtroom is about 60 feet to the hallway.

Mr. Baker: I would say sixty feet.

Mr. Fowler: Somewhere between 250 and 300 feet. Then, the witness could testify how soon the bus could have stopped within that time if the brakes had been applied from 200 feet.

Mr. Baker: No, there is no evidence of 200 feet.

Mr. Hall: I beg to differ with counsel. The witness testified four times the distance of this courtroom. I think it is fifty feet; that is four times fifty feet or

(Testimony of Lieutenant Howard Jones.)

200 feet. In that question I would like to substitute 200 feet. A city block is too indefinite.

Mr. Baker: I object to that. [114]

Mr. Hall: She said the length of this courtroom.

The Court: It won't take too long to estimate it.

Mr. Baker: May the Bailiff estimate it; maybe he knows. Ask him.

Mr. Fowler: I estimate 50 feet.

Mr. Baker: I object to that. You can't take 200 feet.

The Court: Do you want to step it off; is it important enough for that?

Mr. Baker: It isn't too important for me. They are asking the question, not me.

Mr. Hall: I would be glad to step it off.

Mr. Baker: I will take the Bailiff's word for it, if he knows.

The Court: Let him whisper it to you and see if you will agree on it.

Mr. Baker: I will take his word for it. Sixty-five feet, he said.

The Court: Now then, four times 65 is 260 feet.

Mr. Hall: We will substitute 260 feet for a city block in that question and the Court feels, I think, it embraces the fact in the——

Mr. Baker: You better rephrase the question about the bodies flying. [115]

Mr. Hall: We also withdraw the portion of the question which has to do with the bodies.

The Court: Let me suggest this to you. I think for the purpose of the hypothetical question, you can

write out a question that will state both sides, or satisfy both sides.

Mr. Baker: Then take a few minutes recess and write it out.

The Court: That then will be satisfactory because some elements are not in accordance with the facts.

Mr. Hall: I will tell you what we might do; we have two doctors here—I don't think Mr. Carlton will be interested in those questions. If we put the doctors on, we can withdraw Mr. Jones.

Mr. Carlton: May I be excused from the courtroom?

The Court: Yes.

Mr. Hall: I will call Doctor Thomas.

DOCTOR N. K. THOMAS,

called as a witness on behalf of the plaintiffs, being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Hall:

Q. State your name, Doctor. [116]

A. N. K. Thomas.

Q. Where do you live?

A. Tucson, Arizona.

Q. What is your business?

A. Physician and surgeon.

Q. Licensed to practice in the State of Arizona,
Dr. Thomas? A. Yes, sir.

Mr. Baker: We will admit his qualifications, then.

Q. Do you know a Mrs. Bertha Lucille Rhodes,

(Testimony of Doctor N. K. Thomas.)

who sits beside me (indicating.) A. I do.

Q. Did you have occasion in the past to treat her professionally? A. I have.

Q. When? A. On June 26, 1947.

Mr. Baker: What date was that?

(Last answer read by the Reporter.)

Q. Did you have occasion at that time to take x-ray pictures of her? A. I did.

Q. Do you have those x-ray pictures with you?

A. Yes.

Q. How many do you have, Dr. Thomas? [117]

A. Two.

Q. May I have them, please?

A. Yes (handing same to counsel).

Mr. Hall: Would you mark these for the purpose of identification (indicating)?

The Witness: No, I have three.

Mr. Hall: I wonder how we should mark our exhibits. I suppose as if they were one plaintiff?

The Court: Are these exhibits here being used as——

The Clerk: Yes.

Mr. Hall: Yes, I think so.

Mr. Baker: That wouldn't make any difference to the Judge. The evidence will identify it to your own client anyway.

The Clerk: That will be Plaintiffs' Exhibit 6, 7 and 8 for identification.

Mr. Hall: Thank you.

(Thereupon the above referred to x-rays were marked for the purpose of identification as Plaintiffs' Exhibits 6, 7 and 8.)

(Testimony of Doctor N. K. Thomas.)

Q. I hand you Plaintiffs' Exhibit 6, Doctor, and ask you to state if you took that x-ray picture (indicating)? A. If I took it personally?

Q. Or did you supervise the taking of that picture? [118]

A. This picture was taken by the regular x-ray technician employed by the Clinic.

The Court: Just a little louder please.

Mr. Baker: If you prove that it was taken under his supervision, I won't object to that ground.

Q. Doctor Thomas, you are connected with what clinic here? A. Thomas-Davis Clinic.

Q. That clinic was established by your father many years ago? A. Yes, sir.

Q. You have been connected with that institution how long? A. Since August 15, 1940.

Q. As a member of that institution and one of the owners, Dr. Thomas, do you supervise and have charge of the taking of x-rays in the x-ray department in the Clinic? A. Yes.

Q. Was this Plaintiffs' Exhibit 6 taken under such supervision? A. It was.

Mr. Hall: I offer it in evidence.

Mr. Baker: We object to it, not on the grounds of its identity, but on the ground that this x-ray was taken on June 26, 1947; that is a matter of a [119] year and three months from the time of the accident; no evidence showing that any condition that existed at that time would be applicable to the accident.

Mr. Hall: If the Court please, I wanted to call these doctors out of order. Perhaps we could have

(Testimony of Doctor N. K. Thomas.)

had Mrs. Rhodes testify, which I am sure, and I will avow that I will connect the testimony up with the accident. If I may, I think they are admissible to show her condition at that time. I think the x-ray pictures I have taken today would be admissible at the present time if they were connected up with the accident, and I propose to do that with Mrs. Rhodes' testimony.

The Court: I think that is true, if they were connected up.

Mr. Baker: That would be true, if they were connected up. Ordinarily I don't have that objection. This is a year and three months. I wouldn't confess her condition was the same a year and three months after.

Mr. Hall: It is my contention that we can connect it up.

The Court: Come forward and we will discuss it.

(Counsel and Court confer at the bench as follows:)

The Court: The damages not only contemplate [120] pain, suffering, but not only the disability that happened at the time but in the future.

Mr. Baker: That is correct.

The Court: If this has at least something to do with the future——

Mr. Baker: But a picture taken one year and three months after the accident doesn't show what might have happened at the time of the accident.

The Court: That may be true, but counsel says he will connect it up with her.

(Testimony of Doctor N. K. Thomas.)

Mr. Baker: I don't know how he can do that.

Mr. Hall: Here is what she will testify to; she will testify that her back was injured for some time and she kept letting it go and did not go to a doctor for a long time, and finally she went to a doctor, went to several, and found a condition in her back; the vertebrae had slipped and she said she had been suffering ever since the date of the accident and still does today. Now, that is the situation; for a long time she didn't go to a doctor.

Mr. Baker: She will testify?

Mr. Hall: She will testify.

The Court: Are those the only x-rays taken?

Mr. Hall: The only ones. She is a rancher's wife and has lived in the desert country and is a kind of a woman who never came to town and saw doctors. [121] I think it is admissible.

The Court: It is admissible up to that. It may not be worth much.

Mr. Baker: I object to all these back injury cases.

The Court: I am not suggesting that you should withdraw your objection. You can make whatever objections you wish. That is your privilege.

Mr. Hall: I think as to the credibility, that is something to argue.

The Court: I think that is admissible. Suppose for example, if she had been examined to see what her condition was on the day of trial, that has often been done. I had it done many times.

Mr. Baker: But you identified it up to that date?

Mr. Hall: That is what I want to do.

(Testimony of Doctor N. K. Thomas.)

The Court: If it is not connected up, you can make your motion to strike.

Mr. Baker: I will still object.

(Counsel returned to their seats.)

The Court: The objection is overruled. You may proceed.

Q. May I have that x-ray, Doctor? Doctor Thomas, will you step up to this x-ray board or x-ray machine—[122] I don't know what you people would call it——

The Court: I might say, Mr. Baker, if this evidence is not connected up, the showing is made subject to your motion is all right.

Mr. Baker: Thank you.

Q. Now, Doctor Thomas, you say this x-ray was taken of Mrs. Rhodes, one of the plaintiffs in this case, back in June of 1947?

Mr. Baker: March, 1947—no, June.

Q. June, 1947? A. June, 1947.

Q. Your answer is "yes"? A. Yes.

Q. Is this a picture of Mrs. Rhodes (indicating)?

A. It is.

Q. Now, have you had occasion to examine that exhibit in the last few days? A. Yes.

Q. Will you state to the Jury what you found, if anything, that was irregular in the spinal column there of Mrs. Rhodes?

A. Well, this particular plate shows nothing particularly significant except haziness in this region,

(Testimony of Doctor N. K. Thomas.)

which the Jury can see. The main findings are on a lateral plate, one of the other exhibits.

Q. Would you prefer looking at one of those first? [123]

A. Well, this particular plate does not show much of interest.

Q. Which one shall we take next?

A. Number 7.

Mr. Hall: I offer in evidence exhibits 7 and 8 for identification.

Mr. Baker: Were these pictures taken at the same time as Plaintiffs' Exhibits 5 or 6?

The Witness: All three pictures were taken at the same time.

Mr. Baker: We make the same objection as we did to the previous offering, Your Honor please.

The Court: The same ruling.

Q. Will you explain that x-ray picture to the Jury, Doctor Thomas?

A. As the Court will view this picture, the vertebral column is relatively in line. The normal curve is all right until it gets to this level (indicating). It will be seen that this particular vertebra has slipped one-half inch on the vertebra immediately below. That is the striking thing, the diagnostic feature of this picture.

Q. Dr. Thomas, what could have caused this slipping of the vertebra?

Mr. Baker: Well, we object to that as calling for a conclusion of the witness. [124]

Mr. Hall: Yes, it is.

(Testimony of Doctor N. K. Thomas.)

Mr. Baker: The question should not be what caused it.

Q. You may base that, Dr. Thomas—I might add this—on her general condition and the x-ray pictures you took of her and the examination you made in June of 1947.

Mr. Baker: I think we will object to it on the ground he hasn't been properly qualified to testify as to an opinion in this particular case from the evidence adduced up to this date.

The Court: You admitted his qualifications generally, did you not?

Mr. Baker: Oh, yes.

The Court: To testify as an expert.

Mr. Baker: Even an expert can go to guessing.

The Court: I think he is in the realm of an expert's experience. I think he may answer.

A. This injury was probably caused, this particular condition was probably caused by some traumatic injury.

Q. Can you tell by looking at the injury or have any general idea as to about when the injury could have been caused?

A. The only thing I can say is that the injury—

The Court: A little louder, please. [125]

A. The only thing I can say is that the injury occurred some time prior to the time this picture was taken.

Q. What is the technical name for this condition?

A. Spondylolisthesis.

Q. I wonder, Doctor Thomas, if that means the

(Testimony of Doctor N. K. Thomas.)

slipping of the vertebra from its regular position in the spinal column, that we generally know as the spinal column.

A. That is correct.

Q. Did you examine Mrs. Rhodes generally at that time? A. I did.

Q. What was her condition?

A. The principal thing that bothers her at the time was the fact that she had pain and tenderness over this area that one sees in the area, namely, the level of the fifth lumbar on the first sacral.

Q. Was she complaining of pains and aches in the back? A. She was.

Q. Does this condition explain to your satisfaction that this could cause the pain and soreness she complained of at that time?

A. This could very well have caused the complaint. [126]

Q. Did you give her a general examination?

A. Only insofar as her back was concerned.

Q. Did you give her a urinal? A. Yes.

Q. Will you refer to your chart, please.

A. She had a urine examination on that same date.

Q. What was your finding on that?

A. There was nothing abnormal about the urine examination.

Q. Did you take a blood count?

A. We took a blood count on that date.

Q. Now, Dr. Thomas, will you refer to the other x-ray pictures and you may select either one you

(Testimony of Doctor N. K. Thomas.)

want to choose and put it on the board for us. Referring now, Dr. Thomas, to Plaintiffs' Exhibit 8 in evidence, I will ask you to state what that picture shows?

A. This picture shows essentially the same thing as shown in the similar picture, I believe Exhibit 6. It shows haziness, increased cloudiness and fuzzy appearance that is not present at the other levels, present at the fifth lumbar and first sacral.

Q. Is that what you call the "small" of the back? A. Yes.

Q. That is just above the hip bone in the back?

A. Yes. [127]

Q. How do you account for the fuzzy condition of the picture; is that what you said?

A. I account for it on the basis of the spondylo-listhesis.

Q. In other words, the slipping of the vertebra.

A. The injury.

Q. What effect does it have on this area that you refer to as the "fuzzy" area?

A. Well, it sets up an arthritic condition which is an over-growth of bone in the region.

The Court: I am sorry, I couldn't hear you.

A. It sets up an arthritic condition with an over-growth of bone in the region.

Q. Dr. Thomas, do you have any information as to the amount of money that Mrs. Rhodes paid your clinic?

Mr. Baker: I think I will object to that; that is

(Testimony of Doctor N. K. Thomas.)

not the criterion. The criterion is the reasonable value of the services.

The Court: You mean the amount of money paid for those services here?

Mr. Hall: Yes.

The Court: He may answer.

A. I have no information at the present time. I can look up the records if the Court requests.

Mr. Hall: Well, you may cross-examine.

Mr. Baker: No questions. [128]

Mr. Hall: I wonder if you would leave those x-ray pictures here. Perhaps we should leave them here with the clerk, if there is no objection.

The Clerk: No objection.

Mr. Hall: Dr. Secrist, you come forward, please.

DELBERT L. SECRIST

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hall:

Q. Will you state your full name, Dr. Secrist?

A. Delbert L. Secrist.

Q. You live in Tucson? A. Yes, sir.

Q. Are you a licensed physician and surgeon in the State of Arizona? A. Yes, sir.

The Court: How do you spell your last name, please?

The Witness (spelling): S-e-c-r-i-s-t.

(Testimony of Delbert L. Secrist.)

Q. How long have you been practicing your profession?

Mr. Baker: We will admit those qualifications.

A. Since 1930, is the date of my license, sir.

Q. Have you been practicing in Tucson?

A. Yes, sir, with the exception of four years in [129] the army.

Q. Have you had occasion, Dr. Secrist, to treat Mrs. Rhodes, sitting at the end of the table, professionally (indicating)? A. I have.

Q. Can you tell us when it was?

A. I don't have my records with me. In fact, they are not available. At the time I first saw Mrs. Rhodes I was associated with Dr. Victor M. Gore. My records were in with him a year ago, and when I went away, the records were disposed of because he has died. I guess it was in the spring or early summer of April, 1947. I think the nurse can verify that, if it is not correct.

Q. Would you say March, 1947, is close?

A. I wouldn't specify it. My recollection had it a year ago in the spring or early summer.

Q. Did you give her an examination at that time? A. I did.

Q. What did your examination disclose?

Mr. Baker: I object to that as being too remote from the time of the accident and there is no connecting testimony.

The Court: Overruled.

Q. You may answer, Dr. Secrist.

A. She came to me complaining of a backache.

(Testimony of Delbert L. Secrist.)

I [130] did a complete physical examination, finding no other cause to account for the backache, I sent her to Faris, Hayden and Present laboratory for x-rays. The resultant x-rays showed——

Mr. Baker: Now, just a minute; I will object to the resultant x-rays. They are not in evidence.

A. It shows the same things as these (indicating).

Mr. Baker: Just a minute, Doctor.

Q. Dr. Secrist, I will hand you Plaintiffs' Exhibit 7 in evidence, an x-ray picture, and ask you to state if you have seen that x-ray picture before?

A. I can answer that before I start. I haven't seen this one, but I have seen ones like this (indicating).

Q. Will you state to the Jury what you found from your examination of the x-ray picture, which is Plaintiffs' Exhibit 7 in evidence (indicating).

A. This is a typical case of severe spondylolisthesis, the slipping of one vertebra on one below.

Q. Can you tell by looking at that how long that condition might have existed? I will withdraw that. Just have a seat, Doctor. Dr. Secrist, would this condition as you observed it here, be sufficient to explain, and to be the cause of the soreness and pain which she complained of when she visited you?

A. Yes, I think it is entirely so.

Mr. Hall: Take the witness. [131]

Mr. Baker: No questions.

Mr. Hall: That is all. Thank you, Doctor.

MRS. BERTHA LUCILLE RHODES,

offered herself as a witness in her own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hall:

Q. Will you state your name, please?

A. Bertha Lucille Rhodes.

Q. Now, Mrs. Rhodes——

The Court: Now, can I ask you, Mrs. Rhodes, to please speak louder, slowly, and take it easy so that we can all hear you and know what you say.

Q. Where do you live, Mrs. Rhodes?

A. In Tucson.

Q. How long have you lived in Tucson?

A. The past fifteen years.

Q. Have you lived on a ranch the greater portion of that time? A. Yes, I have.

Q. Where was the ranch?

A. Twenty miles out of Oracle.

Q. North of Oracle? A. Yes. [132]

Q. How long have you actually been living in the City of Tucson? A. Three years.

Q. Mrs. Rhodes, did you ride the Greyhound Bus Lines on the 25th day of March, 1946?

A. Yes.

Q. And where did you board the bus?

A. At Safford, Arizona.

Q. Did you buy a ticket on the Greyhound Lines? A. Yes.

Q. Was there anyone with you?

(Testimony of Mrs. Bertha Lucille Rhodes.)

A. My little boy.

Q. How old was he at that time?

A. He was five.

Q. You and your little boy bought tickets at Safford?

A. Just for myself.

Q. You got on the bus at Safford?

A. Yes.

Q. Was Mr. Bach, the young man over here, the driver of that bus, or do you recognize him (indicating)?

A. I don't recognize him.

Q. Have you ever seen him—had you ever seen the driver—

Mr. Baker: She was on the bus, I will stipulate to that, and Mr. Bach was driving it. [133]

Q. Had you ever seen the driver of that bus before the day you got on the bus at Safford?

A. No.

Q. Where did that bus go from Safford?

A. You mean the first stop it made?

Q. Yes, where did you go?

A. I went to Melrose, New Mexico.

Q. That is where you were going?

A. Yes.

Q. Where did the bus stop after you got on at Safford, do you remember?

A. At Duncan, I believe.

Q. Did you stop at Lordsburg first and then Deming?

A. Yes.

Q. Did you know anything about the bus schedule or time it was supposed to arrive at these towns?

A. No.

Q. Do you recall an accident on the highway

(Testimony of Mrs. Bertha Lucille Rhodes.)

west of Las Cruces? A. I beg your pardon?

Q. Do you recall an accident in which the bus you were on was involved in an accident west of Las Cruces on that day? A. Yes.

Q. About where was that accident, as best you know? [134]

A. About fifteen miles east of Las Cruces.

Q. You don't know except what somebody told you? A. Yes, I heard that report.

Q. About what time of day or night was it?

A. As I remember, it was just before the sun went down.

Q. What was the first thing you noticed about it that was unusual as you were riding along on the bus? A. It was unusual?

Q. Yes; what is the first thing you noticed about the accident?

A. Well, I was just getting up. I was awful hurt.

Q. You were just riding there and something happened and you fell in the bus?

A. Well, I didn't realize I fell. The first thing I realized was when I was getting up.

Q. You don't remember when you fell?

A. No.

Q. Do you know what made you fall, or did you at that time know what made you fall?

A. No.

Q. Had you seen any other cars on the highway or any other traffic at all?

A. I must have, but I don't recall any.

Q. You don't remember? A. No. [135]

(Testimony of Mrs. Bertha Lucille Rhodes.)

Q. Do you remember what you were doing when the accident happened?

A. Just sitting there with my little boy.

Q. Where were you seated in the bus, if you recall?
A. About middleways in the bus.

Q. Were you on the inside or outside?

A. You mean sitting on my seat?

Q. Yes.
A. I was on the outside.

Q. With the little boy on the inside?

A. Next to the window.

Q. You don't remember anything that happened before you fell in the aisle?
A. No.

Q. Do you remember anything about the condition of the traffic or the cars or anything after the accident?

A. No, I just remember some of the patrol officers.

Q. Just tell us what you remember took place, if you do remember what took place, after you were lying down in the aisle of the bus; what was the next thing that occurred?

A. Well, I raised up and I wanted to find out where my little boy was. I began to look for him. He was down between the seat with the breath knocked out and I tried to console him, keeping him from [136] crying.

Q. He was crying?
A. Yes.

Q. Did you notice other people in the bus?

A. I noticed a smaller baby that was crying.

Q. Was the bus standing upright?

A. Yes, it was leaning a little.

(Testimony of Mrs. Bertha Lucille Rhodes.)

Q. How did you get off the bus?

A. From the rear.

Q. Did you notice that the front end of the bus was torn out?

A. Well, I didn't look too much because I didn't want to see too much, and I was all excited and I was afraid that I would see those people that were killed in the car.

Q. So, you left the bus.

A. I just tried to.

Q. Did you and your little boy get out without help from anyone? A. No, they helped us.

Q. Do you know who helped you?

A. I think the patrol officer and the girl who testified this morning.

Q. Did you see Mrs. Tuck there, the lady who testified this morning? A. Yes. [137]

Q. Was she giving you first aid, do you remember? A. Yes.

Q. Did you see Mr. Bach, the bus driver?

A. I saw the bus driver.

Q. Did he help, or what was his condition?

A. He was hurt badly.

Q. Was he lying down?

A. He was sitting down, looking awful hurt.

Q. What did you do after you got off the bus?

A. I got on another bus.

Q. Where did you go? A. Las Cruces.

Q. Did you go to the hospital?

A. Well, they took us someplace to be examined.

(Testimony of Mrs. Bertha Lucille Rhodes.)

Q. Did you see Mr. Rumeh, the other plaintiff, this gentleman sitting here (indicating)?

A. I don't recall him.

Q. Do you remember seeing any people or bodies of people out in front of the bus lying prone?

A. Yes, some people groaning and complaining.

Q. Now, Mrs. Rhodes, what happened to you physically as a result of that accident there?

A. Well, I didn't realize that I was hurt so badly until about a couple of hours later, I began to get stiff.

Q. What happened to your teeth? [138]

A. That is the first thing I realized: my mouth was all swollen and bleeding.

Q. Did you lose any teeth? A. Yes, two.

Q. Two? Were any other teeth broken?

A. Yes.

Q. Or injured?

A. Yes, broken to where I couldn't use it. It was broken off sharp.

Q. Was your mouth sore? A. Yes.

Q. To what extent?

A. That I could not eat for several days.

Q. What other injuries did you receive from the accident?

A. Well, my both legs turned black and blue from the knees down.

Q. How long did they bother you?

A. It was two months before I could get around, but my back, too, was very painful.

Q. What part of your back was painful?

(Testimony of Mrs. Bertha Lucille Rhodes.)

A. Well, the small of my back. My back was the worst pain that I had.

Q. How did your back feel, Mrs. Rhodes?

A. Just stiff. And when I would get up on my feet I would have to sit down or lay down. [139]

Q. How old are you now? A. Forty-five.

Q. Did your back improve as time went on?

A. Well, I thought it would improve, but it did not. It got worse and worse and worse.

Q. What finally happened?

A. I had to go to a doctor.

Q. Whom did you go to? A. Dr. Secrist.

Q. And did you go to some other doctors? Strike that out. Did you go to Dr. Thomas?

A. Later.

Q. But you went to Dr. Secrist first?

A. Yes.

Q. Those are the two gentlemen who testified here? A. Yes.

Q. Did you explain to both those gentlemen how you felt? A. Yes.

Q. The soreness and pains in your back continued from the time of the accident until you went to Dr. Secrist? A. Yes.

Q. Had they gotten worse or better would you say? A. Worse.

Q. Did they continue, the same pains, until you went to Dr. Thomas? [140] A. Yes.

Q. And what has been your condition since then?

A. Well, the pain when I get up in the morning, it is so severe I can't go—I can't get going for

(Testimony of Mrs. Bertha Lucille Rhodes.)

about two hours. I have to sit around here and there.

Q. Are you able to do your work? A. No.

Q. Prior to the accident, were you able to do your work? A. I tried to do it.

Q. Did you do it?

A. Well, I would have to call in help.

Q. Once in a while? A. Yes.

Q. Were you living on a ranch? A. No.

Q. Prior, did you—I don't think you understood. Before your accident, did you do your work?

A. Yes.

Q. Were you getting along all right?

A. Yes.

Q. Were you in good health? A. Yes.

Q. Following your accident, you had to have help, did you? [141] A. Yes.

Q. Do you still have to have help to take care of part of your work, of you and your little boy?

A. More than ever, yes.

Q. Your condition today, so far as your back is concerned, is as bad, in the same vein, or better than it was when you went to Dr. Thomas in 1947?

A. It is worse.

Q. Does it pain you today? A. Yes.

Q. Now, just explain to the Court and Jury, Mrs. Rhodes, how it pains you, how it affects you and how it interferes with your work, in your own words.

A. Well, just say, like this morning, I wanted to get up early so that I could be down here in the morning. Mother Rhodes—I would start the break-

(Testimony of Mrs. Bertha Lucille Rhodes.)

fast, and I started the breakfast but that is about all.

Q. Why couldn't you?

A. I can't stay on my feet.

Q. You get tired?

A. Oh, it is the pain; it is a severe pain across the back.

Q. In the small of your back?

A. Yes. [142]

Q. Have you considered an operation?

A. Went as far as to make appointments with the hospital, reservations.

Q. You planned on having an operation?

Mr. Baker: Well, that was a question to ask the physician. I don't think the witness is qualified to determine whether she needs an operation or not.

Mr. Hall: I am asking whether she planned to. She would have to decide it.

A. The doctors told me——

Mr. Baker: Just a minute; that is a question that should have been asked of the physicians, if the Court please.

Mr. Hall: I think it is proper as to what her plans are.

Mr. Baker: That wouldn't make any difference, what she planned, unless it was necessary.

The Court: I think that is true; that might have been asked of the physicians, but I believe she may testify if she expects to be operated on.

Q. You may answer the question, Mrs. Rhodes.

A. The doctors left it up to me.

(Testimony of Mrs. Bertha Lucille Rhodes.)

Mr. Baker: Just a minute; I object to what the doctors said; that is hearsay.

Q. Do you know now whether you are or are not going to have an operation? [143]

A. I will have to have an operation.

The Court: I didn't hear that.

The Witness: I will have to have an operation.

Mr. Baker: I move to strike that, that is improper. That is purely within the province of the physician.

The Court: The answer may stand.

Q. How much money have you spent for your care in connection with this back injury, back condition, since the time of this accident?

Mr. Baker: Well, I believe I am inclined to object to that. I don't think that is the proper way to prove it. She can't make a general statement. If she has bills or amounts——

The Court: That is correct; she ought to have the amount of money that she has expended.

Mr. Hall: We have all these bills. I might get that information. I had some difficulty.

Mr. Baker: That is essential.

Q. Do you have any of the receipted bills with you?

A. I have down what I have been out; no receipted bills.

Q. No receipted bills?

A. No, but I do have down what I have been out.

Q. Now, Mrs. Rhodes——

(Testimony of Mrs. Bertha Lucille Rhodes.)

Mr. Hall: I think she should be able to answer [144] the question.

The Court: If she has them.

Mr. Baker: If she has the items, yes.

Q. Do you have your items? A. Yes.

Q. How much have you spent as the result of—

A. I have spent \$690.

Q. Now, Mrs. Rhodes, have you had your teeth put back? A. No.

Q. Are they still out? A. Yes.

Q. Are they the upper teeth? A. Yes.

Q. Do you plan on having those put in?

A. Yes, it is bridgework.

Q. Bridgework. Have you had an estimate of what that would cost you?

Mr. Baker: We will object to that, if the Court please.

Mr. Hall: That is the only way she can tell; what they told her.

A. I know what it costs to put it in.

The Court: Just refrain from answering the questions until the disposition of these objections.

Mr. Hall: I have asked, the Court please, if she had an estimate of what it would cost her.

The Court: Well, you might—if she has had an estimate, it isn't exactly the way to prove it, but—

Mr. Hall: No, it is not. If the Court please, I can go see the dentist. We can pay the dentist for what is owing them or have them come down and testify. In other words, I would have to send her down. I wanted to save her that expense. That is the only reason why I am doing it this way.

(Testimony of Mrs. Bertha Lucille Rhodes.)

The Court: I suggest that you gather together all these documents and give them to counsel. He might be willing to discuss the matter with you. I think you should lay a better foundation for those expenditures.

Mr. Hall: You may cross-examine.

Cross-Examination

By Mr. Baker.

Q. Mrs. Rhodes, all you know about this accident is that you and your boy were riding along on the bus and suddenly you found yourself in the aisle; that is about all you know?

A. That is what I know after the accident, that I was hurt in getting up out of the aisle.

Q. You didn't see the collision or anything of that kind? [146] A. No.

Q. If there was one? A. No.

Q. But, I say, all you know is that you were riding the bus and you were on the floor? A. Yes.

Q. And after the accident you saw the driver of the bus and he was badly hurt? A. Yes.

Mr. Baker: That is all.

Mr. Hall: That is all, Mrs. Rhodes.

Mr. Fowler: That is all the examination we have until we frame the hypothetical question to Mr. Baker.

Mr. Baker: You are going to frame it, not me; it isn't my question.

Mr. Fowler: I thought Mr. Baker said that he would be very glad to assist us in framing it.

Mr. Baker: I did not. I said, all you better do is set it down in writing to save time.

The Court: We will give you time to write out the question.

Mr. Baker: I will be glad to read it.

The Court: You are holding this one witness here, are you? [147]

Mr. Baker: Yes.

Mr. Fowler: For possible rebuttal tomorrow too, Mr. Jones.

Mr. Baker: If you are holding him, you might take a recess now.

Mr. Fowler: And argue about the questions and instructions. We have one juror to go to Tombstone yet.

The Court: What was that?

Mr. Fowler: We have one juror to go to Tombstone yet to vote.

The Court: So, you can't progress any further this afternoon between now and 3:30.

Mr. Fowler: I think we could all right, without this hypothetical question, unless your Honor wants to rule.

The Court: Can you put on some other witness?

Mr. Fowler: Mr. Rumeh.

Mr. Baker: Do you mind? We have an understanding with Mrs. Rhodes to take the stand a few minutes.

BERTHA LUCILLE RHODES,

having previously offered herself as a witness in her own behalf and having previously been sworn, testified further as follows:

Redirect Examination

By Mr. Hall:

Q. Mrs. Rhodes, what is the estimated cost of the [148] dental work necessary to put your teeth back

(Testimony of Mrs. Bertha Lucille Rhodes.)

by bridgework? A. \$125.

Mr. Hall: Any questions?

Mr. Baker: No.

Mr. Hall: That is all; come down.

GEORGE RUMEH,

plaintiff herein, called as a witness in his own behalf,
being first duly sworn, was examined and testified
as follows:

Direct Examination

By Mr. Fowler:

Q. What is your name, please?

A. George Rumeh.

Q. Where do you reside?

A. Claypool, Arizona.

Q. How old are you now? A. Forty-two.

Q. How old were you in March, 1946?

A. Thirty-nine.

Q. Are you married? A. Yes, sir.

Q. Is your wife living? A. Yes, sir.

Q. In Claypool, Arizona? A. Yes. [149]

Q. Do you have a child? A. Yes, sir.

Q. How old is the child?

A. She will be eight this month.

Q. Where is Claypool?

A. Claypool is—well, the easier way to describe
it, it is right in between Globe and Miami.

Q. That is a distance of seven miles?

A. It is seven miles between Globe and Miami,
and we are in between.

Q. That is where the ball club plays?

A. That is right.

(Testimony of George Rumeh.)

Q. What were you doing in March, 1946; what were you doing then?

A. I had a grocery store.

Q. Have you got the grocery store now?

A. No.

Q. How long since you had it?

A. A little over two years.

Q. Were you supporting your wife and child?

A. Yes, sir.

Q. How long have you lived in Claypool?

A. Well, I lived in the district there since 1911; that is 37 years.

Q. Thirty-seven years. You were almost born there? A. Almost. [150]

Q. Did you board the Greyhound bus near that point? A. Yes, sir.

Q. Where? A. I boarded the bus in Globe.

Mr. Fowler: I imagine you will stipulate that he was a paid passenger?

Mr. Baker: Yes, sir.

Q. By yourself? A. Yes, sir.

Q. Where were you going?

A. To a funeral of one of my uncles.

Q. Where? A. Fort Smith, Arkansas.

Q. Were you going to Las Cruces?

A. I was going through Las Cruces.

Q. El Paso? A. Yes.

Q. Were you on the same bus all the time?

A. Yes.

Q. You got on at Globe, I think? A. Yes.

Q. Where was your first stop?

A. Safford.

(Testimony of George Rumeh.)

Q. It didn't stop at Duncan?

A. Duncan is the other side.

Q. Do you remember Mrs. Rhodes getting on?

A. No, I do not, but we stopped in Safford for lunch; somebody got on, somebody got off.

Q. Where was your next stop?

A. I think it was about seven miles out of Safford.

Q. A regular station?

A. No, there is an inspection station there and they stopped there.

Q. Was it one of these Arizona inspection stations?

A. Yes, somebody had missed getting on to the bus, and they held us up.

Mr. Baker: I object to that as——

The Court: Not very material.

Q. Then where next did you stop?

A. Duncan.

Q. Then where did you stop?

A. Las Cruces.

Q. Hadn't you missed—— A. Deming.

Mr. Baker: You stopped at Lordsburg.

A. Lordsburg, and then Deming.

Q. Did you see Mrs. Tuck get on the bus?

A. Well, I didn't know her. Maybe I saw her, but I didn't pay attention to her.

Q. Did you stop at Deming?

A. Yes, we stopped at Deming.

Q. Then what happened as you approached Las Cruces? [152]

A. I really don't know. I was lying down in the bus.

(Testimony of George Rumeh.)

Q. Where were you? A. On the front seat.

Q. On the driver's side?

A. On the other side of the driver.

Q. He was on the left-hand side and you were lying down on the right side? A. Yes.

Q. Was there anything in front of you?

A. No. I was in the first seat in the aisle.

Q. Nothing in front of you but the windshield?

A. I guess so.

Q. And a little rail?

A. I guess that is what it was.

Q. Do you know how fast he was going?

A. No, I don't. I was lying down. I was going to be on that bus for two days and two nights, and I was trying to rest.

Q. What awakened you?

A. He slammed on his brakes. He held them down for a little while, and I sat up.

Q. What did you see?

A. I saw this car almost right at us.

Q. Then what happened to you? [153]

A. I don't know. I found myself trying to get up in front. I couldn't get up.

Q. Anybody there with you?

A. Not very close to me. I saw the driver there. He was farther back.

Q. What was your condition, physical condition?

A. Well, there must have been something wrong with my back because I tried to get up but I couldn't.

Q. Nobody helped you get up?

A. They brought some topcoat, putting it on me.

Q. Were you out of your head?

(Testimony of George Rumeh.)

A. Well, I must have been.

Mr. Baker: If he was out of his head, he wouldn't know.

Q. Were you suffering from any concussion?

A. I was paining all over.

Q. Were you taken into Las Cruces?

A. Yes, sir.

Q. By whom? A. Some ambulance.

Q. How long did you stay there?

A. I was there two weeks.

Q. Were you taken to the hospital there?

A. Yes.

Q. How much did you pay the hospital?

A. And the hospital and the doctors, we got at \$300 [154] for the two weeks.

Q. Dr. who?

A. Dr. C.—Dr. Evans, anyway.

Q. Dr. Evans in Las Cruces? A. Yes.

Q. And the hospital in Las Cruces?

A. Yes.

Q. What was the name of the hospital?

A. McBride.

Q. McBride Hospital? A. Yes.

Q. Where did you go from Las Cruces?

A. The first day I got up I came home.

Q. To Claypool, Arizona? A. Yes, sir.

Q. Did you miss your uncle's funeral?

A. Yes.

Q. He was buried in the meantime?

A. Yes.

Q. What did you do when you got back to Globe?

Mr. Baker: Well——

(Testimony of George Rumeh.)

Mr. Fowler: I am asking about medical expenses.

Mr. Baker: You better ask him about—we are not interested in his life from now on.

The Court: Proceed. It is a proper question.

Q. What did you do when you got back to Globe?

A. I went to bed.

Q. Did you hire a doctor? A. Yes.

Q. Who? A. Brayton.

Q. How long did he treat you?

A. He treated me for about three or four months.

Q. What did he treat you for?

A. Well, I had something wrong with my back. I couldn't straighten it out, so, he kept watching my head. I had a cut on top of my head that I had sewed up in the hospital at Las Cruces, and my nose had been broken and had to be broken over to be reset in Las Cruces, so my chest had been caved in. He kept watching my chest more than anything.

Q. He knew you had tuberculosis? A. Yes.

Q. Had you told him?

A. He knew it before.

Q. Had you been treated by him before the accident? A. Yes.

Q. How much did you pay him, or how much do you owe him?

A. I haven't paid him; I don't know.

Q. How much have you paid him so far?

A. I think it is \$425. [156]

Q. Were you hospitalized at Claypool?

A. No, I stayed home. My wife is a nurse.

Q. When did you next see a doctor?

(Testimony of George Rumeh.)

A. I went to El Paso to see Dr. Long; he is a chest specialist.

Q. And you hired him? A. Yes.

Q. How long has he treated you?

A. He has treated me for a little over two years.

Q. He is the doctor that was on the stand here yesterday? A. Yes, sir.

Q. And made the x-rays of you? A. Yes.

Q. How much do you owe him?

A. Well, I don't know.

Mr. Baker: I object to how much he owes him.

A. I don't know anyways.

Mr. Baker: He doesn't know anyway; that's okay.

Q. You don't know how much?

A. He isn't paid, but I don't know how much.

Q. Can you find out tonight and testify in the morning, as Mrs. Rhodes did, how much you owe Dr. Brayton? A. I can call him, Dr. Long.

Mr. Baker: Dr. Long was here on the stand. I don't think that is proper.

Mr. Fowler: I think——

Mr. Baker: He never testified about medical expenses.

The Court: I think this witness can testify how much indebtedness he owes.

Mr. Baker: He said he doesn't know.

Mr. Fowler: We can find it out in the morning.

The Court: You might ask him the question. He said he didn't know?

Mr. Baker: Yes, he did.

Q. Do you know how much you owe Dr. Long?

A. No, I do not. I didn't think I was through

(Testimony of George Rumeh.)

with him yet. I went to him just two or three days ago, and I am not through with him yet.

Q. Can you tell the Court and jury in the morning how much you owe him?

A. If I can make connections with him on the phone, I can.

Q. How much hospital bills have you incurred?

A. There hasn't been any other hospital bills but some other doctor bills.

Q. What are the other doctors?

A. Dr. Pauley from Phoenix. He is a chiropractor.

Q. That is—(spelling) P-a-u-l—— [157-A]

A. Yes, (spelling) P-a-u-l-e-y, from Phoenix, a chiropractor.

Q. How much do you owe him or how much have you paid him?

A. I paid him \$54 for a few treatments and x-rays.

Q. Of what part of your anatomy?

A. Upon my back and upon my neck.

Q. Who else have you seen?

A. That is all; Dr. Brayton, Dr. Pauley and Dr. Long.

Q. And then this doctor in Las Cruces?

A. Well, that was the first two weeks I paid him.

Q. No other doctors, no other hospitals now?

A. No, that is all.

Q. Are you going to have to see other doctors in the future?

A. I think so. From the reports Dr. Long has given me, I will have to continue going to him.

Q. Are you getting pneumothorax?

(Testimony of George Rumeh.)

A. No, I was getting pneumothorax, but I can't—

Q. Since the accident?

A. No, I had the pneumothorax about fifteen years before the accident. Now, that is all collapsed so that there is nothing in there.

Q. How about your right shoulder and arm?

A. It is still in bad shape. I can lift this about [158] like that, and that is all. (Indicating.)

Q. Are you getting any treatments for that?

A. I don't think I can do anything for it as the doctors told me.

Q. And you are permanently disabled in the right arm?

A. Yes.

Q. And you will not breathe again in the right lung?

Mr. Baker: I object to that; that is calling for a conclusion of the witness.

The Court: Objection is sustained.

Q. Now, your grocery store in Claypool, when did you give that up?

A. I gave that up just a few months after I was in the wreck.

Q. Who had been running it in the meantime while you were recuperating?

A. My wife.

Q. Why didn't she continue?

A. Well, she had to start taking care of me.

Q. What happened to the grocery store?

A. I had to sell it or give it away.

Q. How much had you been making up to March 25, 1946?

Mr. Baker: Do you mean off his grocery store?

Mr. Fowler: Off his grocery store.

(Testimony of George Rumeh.)

Mr. Baker: We object to that. He sold it; no evidence as to the profit. No matter what he sold——

The Court: Your question is what were his earnings prior to the time of the accident?

Mr. Fowler: Yes.

Mr. Baker: From the grocery store.

The Court: From the grocery store?

Mr. Fowler: I will withdraw the question.

Q. What was your earning capacity from the grocery store?

Mr. Baker: I am going to object to it. It is immaterial, because the evidence is that he sold the grocery store after the accident. The evidence would have no bearing except to show loss of earnings and he has a situation, he can't connect it up unless he shows first the profit he made off the sale.

Mr. Fowler: I will withdraw the question. Just a minute, if the Court please.

Q. Mr. Rumeh, could you operate a grocery store at the present time? A. No.

Q. How old are you? A. I am forty-two.

Q. At the present time? [160]

A. Forty-two.

Q. How old were you at the time of the accident, March, 1946? A. Thirty-nine.

Mr. Fowler: You may cross-examine the witness.

Cross-Examination

By Mr. Baker:

Q. Mr. Rumeh, you say immediately before the time of this accident, which was near Las Cruces, you were lying down in the seat, is that right?

A. Yes, sir.

(Testimony of George Rumeih.)

Q. Didn't you have a seat mate?

A. Yes, I did.

Q. A sergeant in the army, wasn't he?

A. He was from—an army man, I don't remember what he was, sergeant or——

Q. Weren't you talking to him at the time of the accident?

A. No, I was not. We got off. I had been talking to him all along. We got seats together at Safford. I hadn't been seated near him and the last time I remember we got off at Deming together, and when I got a drink, and we talked for a little while, and I laid down.

Q. You were lying down at the time of the impact, is that right?

A. Well, as I say, I just sat up just before it [161] happened.

Q. The instant before it happened?

A. Yes.

Q. When the brakes were applied?

A. No, he put the brakes on and kept them on. And after he kept them on, I looked up to see what was——

Q. What did you see?

A. This other car, it looked like it was right at us.

Q. When you looked up, the car was right at you?

A. Yes.

Q. And then this collision occurred?

A. I suppose; I don't remember going out of the window, but I must have gone out of the window because I was outside.

(Testimony of George Rumeh.)

Q. You felt the application of the brakes and then looked up?

A. Not as soon as—I felt them; after I saw he wasn't letting them up, I looked up.

Q. This Ford car was right on top of——

A. I don't know if it was a Ford.

Q. It was right on him? A. That's right.

Q. Well, you were thrown; you don't know what happened? A. I don't know. [162]

Q. How long after that before you remember anything?

A. When I came to, I was out on the ground.

Q. You were out on the ground when you came to?

A. Yes.

Mr. Baker: That is all.

Mr. Fowler: That is all. I will recall him after he finds out what he owes to the doctor in El Paso.

Mr. Baker: I have no object to having him call him.

Mr. Hall: I have one question to ask Mrs. Rhodes.

The Court: Ask her right there.

MRS. BERTHA LUCILLE RHODES,

having been previously sworn, was recalled as witness in her own behalf and testified further as follows:

Further Redirect Examination

By Mr. Hall:

Q. Mrs. Rhodes, did you lose any baggage or personal belongings as a result of the accident?

A. Yes, I did.

Q. What was the value of it?

A. Fifty dollars.

(Testimony of Mrs. B. L. Rhodes.)

Mr. Hall: That is all.

Recross-Examination

By Mr. Baker: [163]

Q. Did you declare—now, I will have to go into it—did you ever declare \$50 valuation on that at the time you checked it? A. (No answer.)

Q. I didn't ask you, but did you ever make a written valuation at the time you checked that baggage, that it was valued at \$50? A. No.

Q. You paid no extra compensation or money?

A. I had just bought the coat.

Q. No, I am talking about checking, Mrs. Rhodes. You never made any written declaration to the agent of the Pacific Greyhound Lines at the time you checked this baggage, showing that it was valued at \$50? A. I know what I paid for the article.

Mr. Baker: Read the question.

Q. It isn't what you paid for the clothes. It is what you—

Mr. Baker: Read the question, please.

(Last question read by the reporter.)

A. No.

Q. And didn't pay any extra money for having it checked and transported, did you? A. No.

Mr. Fowler: Now, if the Court please, that brings up another question for Mr. Rumeh.

Mr. Baker: Do you know the law?

Mr. Fowler: I am terribly sorry.

The Court: I can see you gentlemen are discussing this question of the value of the baggage. This is not an action based on the loss of the baggage in the

usual sense. The witness testified, I believe, as to the value of the baggage at the time; is that correct?

Mr. Hall: If the Court please, we sued for \$50 for the loss of baggage.

Mr. Baker: Well, that is well established under the tariff. Unless you declare extra value and unless you pay for it, you can't recover more than \$25. That is the law. That is why I said——

The Court: Suppose the baggage had been in her possession, would that have made any difference?

Mr. Baker: Would that have made any difference? It would be the same thing. The tariff declares the maximum.

Mr. Hall: That should be handled by the Court's instructions.

The Court: Proceed. [165]

GEORGE RUMEH,

having been previously sworn, was recalled as a witness on his own behalf and testified further as follows:

Redirect Examination

By Mr. Fowler:

Q. Mr. Rumeh, you were sworn before?

A. Yes.

Q. Did you lose anything in the accident?

A. Yes.

Q. What? A. A topcoat.

Q. What kind of topcoat?

A. It was given to me as a gift.

Q. What was the value?

A. It was, oh, around \$75.

Q. Did you make an application with the Pacific

(Testimony of George Rumeh.)

Greyhound Lines? A. Three times.

Q. Did you get your money?

A. No, the last time I went to the Greyhound, they sent me to the adjuster, and the adjuster said, "You have a case against the Court, get it there;" that is the exact words.

Q. You didn't have a hat.

A. I don't wear a hat. [166]

Q. You didn't lose anything else?

A. I had a grip, but they returned the grip.

Mr. Fowler: That is all.

The Court: No further questions of these witnesses?

Mr. Baker: No.

The Court: I think this will be a good time to adjourn so that the juror can get to his voting place. Any objection to recessing at this time?

Mr. Hall: No, your Honor. The plaintiffs are agreeable.

The Court: I want to admonish you again, gentlemen, not to discuss this case amongst yourselves or allow anybody to discuss it with you, or within your presence. Furthermore, you are not to express any opinion as to the merits of the case until the case has been finally submitted for your decision.

Can I see counsel in chambers after ten minutes, after you have had your smokes?

Mr. Baker: Would you mind instructing the witnesses to be here at ten o'clock in the morning?

The Court: All witnesses are to be here at ten o'clock tomorrow morning. You are now at recess.

Mr. Hall: Can Mrs. Rhodes be excused? She made that request. [167]

The Court: Yes.

Mr. Baker: She may be excused.

(Thereupon Court adjourned at 3:30 o'clock, p.m., on Tuesday, November 2, 1948, and reconvened on Wednesday, November 3, 1948, at 10 o'clock, a.m.)

Wednesday, November 3, 1948, Ten o'clock a.m.

The Court: Will you gentlemen stipulate that all the jurors are present?

Mr. Baker: Yes, they are present.

Mr. Carlton: Yes.

The Court: You may proceed.

Mr. Fowler: Mr. Rume, will you take the stand, please.

GEORGE RUME,

having been previously sworn, was recalled as a witness in his own behalf and testified further as follows:

Further Redirect Examination

By Mr. Fowler:

Q. Your name is George Rume?

A. Yes, sir.

Q. You are the same witness who testified at the close of the session yesterday, is that right?

A. Yes.

Q. You have been sworn? A. Yes. [168]

Q. Now, did you ascertain what you owed Dr. Long in El Paso? A. I did.

(Testimony of George Rumeh.)

Q. Did you discover that last night?

Q. How much do you owe him? A. \$350.

Q. Including his appearance on the stand?

A. He said \$350 is in full for what he has coming.

Mr. Baker: I object to his witness fees on the stand, if the Court please. It includes his expert testimony, he is testifying about. I certainly object to that part of it.

The Court: That is no part of the expenses.

Mr. Baker: Therefore I move that the answer be stricken.

Q. How much did he——

Mr. Baker: Just a minute.

The Court: The answer may be stricken, and you may reframe your question.

Q. How much did you owe him prior to his appearance on the stand here the day before yesterday?

A. I just asked him what I owed, sir.

Q. For everything? A. Yes.

Q. And what was his reply? [169]

Mr. Baker: What is that?

Q. And what was his reply?

Mr. Baker: I object to it, if the Court please, that includes his services as an expert witness.

The Court: Does that include his services as an expert witness?

Mr. Fowler: I don't know; I am trying to find out what——

Mr. Baker: The doctor said that he owed him for everything up to last night.

A. I was down there last week. He just got in.

(Testimony of George Rumeih.)

I asked him what I owed him up to date. He said——

Mr. Baker: That was last night?

The Witness: Last night. I asked him what I owed him for everything.

Mr. Baker: Everything; we object to that.

Mr. Fowler: If the Court please, it can be very easily settled. He certainly owes the doctor something, I don't know what Your Honor allows the witnesses; \$50, \$75?

Mr. Baker: I don't know what the doctor charges for expert testimony.

The Court: That is a matter for a private arrangement between the parties.

The Witness: Your Honor, may I say a word?

The Court: You can. [170]

The Witness: It won't be anything. I'm not supposed to even pay him. That is supposed to be taken care of between him and the lawyer; not for me, for me, that is—I didn't make the arrangement for him to come here. I just made arrangements for him to look——

Mr. Baker: He appeared here then on a contingent fee basis, is that right?

The Witness: I don't know.

Mr. Baker: If I understand you right, that is what you are saying.

The Witness: I owe him this money. What he gets for coming here is another thing.

Mr. Baker: That certainly is an uncertain situation.

(Testimony of George Rumeh.)

The Court: What is that?

Mr. Baker: That certainly is an uncertain situation.

The Witness: I am going to have to pay him.

Mr. Baker: I presume you are going to have to pay him here for being a witness here.

The Court: I think we are getting off the course of our stipulation concerning which amount was to be ascertained. I think this was covered by agreement of counsel yesterday, that he was to find out over the phone what was owing for the doctor, [171] medical services. Now then, if there is any question about it, is it satisfactory for counsel that either or both counsel communicate with the doctor and find out so that you may have the record clear on that?

Mr. Fowler: That's all right.

Mr. Baker: That's all right.

The Court: Where is this doctor now?

The Witness: El Paso.

The Court: El Paso?

The Witness: Yes, sir.

The Court: There seems to be some question as to what is included in the amount.

Mr. Fowler: Yes.

The Court: Is it satisfactory that this witness ascertain from the doctor the amount owing to the doctor for medical services only? Is that correct?

Mr. Fowler: We so stipulate.

Mr. Baker: That's all right. I am not being factetious in my objections. I just want it proper

(Testimony of George Rumeh.)

in order to get the proper answer in a proper manner.

Q. Mr. Rumeh, how much did you sell your grocery store for in Claypool?

A. \$6000.

Mr. Baker: What was the answer? [172]

(Last answer read by the Reporter.)

Mr. Fowler: His answer was \$6000.

Q. When did you sell it?

A. A little over two years ago.

Q. After the accident? A. Yes, sir.

Q. What did you have in it?

Mr. Baker: What is that?

Q. What did you have in it?

Mr. Baker: Well, I think we will object to it.

Mr. Fowler: You wanted the profit.

Mr. Baker: I think we will object to it, if the Court please. That is irrelevant and immaterial. The question he got \$6000 for the property is pertinent.

Mr. Fowler: I will withdraw the question.

Q. You have a stock of merchandise in the store?

A. Yes, sir.

Q. How much was the stock?

Mr. Baker: I object to it; it is wholly immaterial and irrelevant. He sold it for \$6000.

The Court: What are you trying to arrive at?

Mr. Fowler: The profit that Mr. Baker yesterday wanted.

Mr. Baker: I didn't mean the profit in that

(Testimony of George Rumeh.)

sense. What I wanted was you first had to establish [173] what he got for that store. That is what I meant to say.

The Court: He has already answered that.

Mr. Fowler: \$6000.

The Court: What is the next question?

Mr. Fowler: My next question is: did he have a stock of merchandise in the store?

The Court: You may answer that.

A. Yes, sir, I had a stock of merchandise in the store.

Q. How much was it?

Mr. Baker: I object to that; wholly immaterial, irrelevant, how much merchandise he had in the store.

The Court: Overruled.

Q. You may answer.

A. Between \$4500 and \$5000.

Q. Did you own the store alone?

A. No, my mother and I were in partners; Dad and I had been until he passed on and then she took Dad's part.

The Court: I can't hear you when you drop your voice.

The Witness: My mother and I were in partners. Dad and I had been until he passed on and then she took his half.

Q. So, the \$6000, you received one-half and one-half went to your mother? [174]

A. One-half went to my mother.

(Testimony of George Rumeh.)

Q. Have you been able to work or be employed since the accident? A. Not a day.

Q. On anybody's orders?

A. On three different doctors' orders.

Q. Mr. Rumeh, were you and your mother earning any money in the store at the time you sold it?

A. Yes, sir.

Q. How much?

A. Well, that is—I couldn't say exactly how much, because different months it would be a different amount. We were making a very nice living; at least able to buy war bonds, which I can't now.

Q. Can you state how much annually you made?

Mr. Baker: He stated he didn't know, if the Court please?

The Court: He can state it again if he can.

A. We made between \$2500—I mean \$250 and \$300 a month.

Mr. Fowler: You may cross-examine.

Recross-Examination

By Mr. Baker:

Q. That is the two of you together?

A. No. That is what we made. We couldn't live on [175] that much together.

Q. What do you mean "we"?

A. When I said "we" made \$250, my wife and I got that much out of the store.

Mr. Baker: That is all; no more questions.

Mr. Fowler: Step down.

Mr. Carlton: Mr. Jones, please.

LIEUTENANT HOWARD JONES,

having previously been sworn, was recalled as a witness for the plaintiffs and testified further as follows:

Further Direct Examination

By Mr. Carlton:

Q. You are Lieutenant Howard Jones?

A. Yes, sir.

Q. And Mr. Jones, you testified in this matter yesterday? A. Yes, sir.

Q. And you have already been sworn in the case? A. Yes, sir.

Mr. Carlton: If the Court please, we will withdraw the question that we asked the witness yesterday and which question was not answered, the hypothetical question, asked yesterday.

The Court: You withdraw it?

Mr. Carlton: We withdraw it and we framed it again and now ask it.

Mr. Baker: You don't have an extra copy of it?

The Court: You might consult counsel and show it to him. It might save some time later on.

Mr. Baker: That one I have no objection to, but this one I do. I don't object to that one, the one I suggested.

Mr. Hall: Ask the question and then state your objection.

Mr. Carlton: If the Court please, counsel has agreed that this one may be asked and he offers an objection to the second one.

Q. Mr. Jones, you have testified that you are

(Testimony of Lieutenant Howard Jones.)

familiar with Highway 80 at a point about 9 miles west of Las Cruces, New Mexico, where an accident occurred, and you have further testified that you are familiar with the type of pavement and roadway at the point of the accident, and you have further testified that you are familiar with air brakes, such as were used by the Greyhound bus involved in said accident, and that you are familiar with the type of bus that was involved, and the effect of the operation of the brakes in connection with such bus. [177]

Now, Mr. Jones, assuming that that Greyhound bus was traveling at the rate of 45 miles per hour at a point 260 feet from the point of impact, do you have an opinion as to how long it would take that Greyhound bus to stop if the brakes were properly applied at that point and continued to be so applied until the bus would have stopped?

Mr. Baker: You say "how long." That should be "within what distance" and not "how long."

Q. Well, within what distance. Within what distance would it take said Greyhound bus to stop if the brakes were properly applied at that point and continued to be so applied until the bus would have stopped.

A. Well, my calculations show——

Mr. Hall: Just "yes" or "no."

Q. Do you have an opinion? A. Yes.

Q. What is that opinion?

Mr. Baker: Or what is that distance.

Q. Well, what is that distance?

(Testimony of Lieutenant Howard Jones.)

A. I figured that at 101.2 feet. Would you like me to put it on the board?

Q. Yes, will you go down and show on the board.

Mr. Baker: We object to it. He says 101.2 feet. [178] He doesn't have to give a demonstration.

Q. All right. Sit down, Mr. Jones. Now, Mr. Jones, laying the same predicate to you, and assuming that the bus was traveling now at the rate of 50 miles per hour at a point 260 feet from the point of impact, do you have an opinion as to how far it would take that Greyhound bus to stop if the brakes were properly applied at that point and continued to be so applied until the bus would have stopped?

Mr. Baker: What is that question? The same question?

Mr. Carlton: The same question but different speed.

Mr. Baker: Oh, at 50.

A. I have, sir.

Q. What is that distance?

A. May I refer to these notes I worked on, Judge?

The Court: Yes, sir.

A. My calibrations show 50 miles per hour, the bus would have come to a complete stop at 130 feet after the brakes were applied.

Q. Assuming the same question, based on a speed of 60 miles an hour at the point——

(Testimony of Lieutenant Howard Jones.)

Mr. Baker: I object to that; no evidence of [179] traveling at 60 miles per hour.

Mr. Hall: That is what we are trying to show. Introducing it at the speed—that is why we are asking that question. The plaintiff is still producing testimony. We know he has 260 feet to travel by one speed and we want to find out, had he applied his brakes, kept them applied at different speeds, where he could have stopped. I suppose if it got over 260 feet, if the answers were more than 260 feet, it would not be admitted.

The Court: Is there an objection?

Mr. Baker: Yes, I objected to it.

The Court: It seems to me you have a general over-all formula rather than figuring out a specific speed. Instead of 40, 50 miles per hour, wouldn't the matter of calculation based on a sort of table be acceptable?

Mr. Hall: I understand these people, such as Mr. Jones, figure these things from certain formulas and he may be questioned about these formulas. Perhaps he has; I don't know. We are asking him to make a calculation as to what speed a bus would be traveling in order to make so many feet.

The Court: Well, the question is 65, 70 feet, things of that kind. [180]

Mr. Hall: The only thing to show, the total, to show what the general situation is. I think we probably have a question there that would cover 260 feet.

(Testimony of Lieutenant Howard Jones.)

The Court: I mean at 55, 60 miles; you can ask him a question at every mile so far as that is concerned.

Mr. Hall: It won't be more than two or three questions. It is the best illustration——

The Court: There is no evidence here of any particular rate of speed from one witness.

Mr. Baker: In other words, he is taking the province of the Jury. He gave a formula yesterday that in twenty miles he could stop in twenty feet; is that it? The Witness: Yes, sir.

Mr. Baker: And then you gave the formula from which you can carry on.

The Court: Did he? Mr. Baker: Yes, he did.

The Court: That is a matter of calculation.

Mr. Baker: He is doing what the Jury is supposed to do. There is no evidence what speed the bus is traveling.

Mr. Hall: That is exactly what we want to show, 260 feet from one point. How fast was he going if [181] he brought the car to a stop at a point of impact. We know he was going so many miles per hour at the point of impact.

Mr. Baker: That is not our question.

Mr. Hall: If you let us alone we will lead up to it.

Mr. Baker: I am not going to let you alone when you are assuming a lot of things not in evidence. I am not certainly going to let this witness make an argument for the Jury.

The Court: Will you gentlemen come forward? I want to state to the Jury that we have questions to discuss. When the Court calls counsel to come up here for the purpose of discussing these matters in which you are not interested, I don't

(Testimony of Lieutenant Howard Jones.)

want your curiosity aroused, about keeping something away from you, but these are matters that are taken care of between the Court and counsel without the presence of the Jury.

(Thereupon Court and counsel conferred as follows:)

The Court: Why can't you do this: you start with 50, 60 miles an hour; can't you say suppose this speed was beyond 50, 60——

Mr. Baker: He gave that formula. [182]

Mr. Hall: You see, Your Honor, we have one witness who saw the skid marks. This bus went 260 feet. It is only to show he didn't apply his brakes. He didn't do what—he was speeding and didn't apply his brakes.

The Court: This is a crucial point in the case insofar as the law that is applicable to this particular phase.

Mr. Baker: They haven't proven what speed.

Mr. Hall: That is what we are trying to show. We have proof of skid marks and distances.

The Court: One or two witnesses testified——

Mr. Baker: The usual rate.

Mr. Hall: We have skid marks.

Mr. Baker: Nobody testified as to the rate of speed. They all testified as to the usual rate of speed.

Mr. Hall: Will you just let me say this: Mrs. Tuck said she saw the skid marks 260 feet when the brakes were applied. Mr. Salas—Captain Salas

(Testimony of Lieutenant Howard Jones.)

said that Mr. Bach told him that he saw this other car 300 feet distant on the wrong side of the road. What we are doing is taking the skid marks or 260 feet away, taking the point of impact. We are trying to show what this bus, going at the usual rate of [183] speed, if he were driving the bus properly, actually that is not what would have happened.

Mr. Baker: I don't believe he can show it that way.

Mr. Hall: But, here is why we are approaching it this way. Instead of fooling around, we have got this question we are going to ask. The bus did not actually stop in 260 feet. We want to approach it this way to show how long it would take to stop the bus at 50, 60, 70, 80.

The Court: It seems to me your proper method would be to have him give the formula, taking this type of bus, and give the formula, that if 50 miles per hour, if the brakes are applied, it would stop within 130 feet and thereafter it would be so much per each additional mile.

Mr. Hall: What we want to do—we wanted to go 50, 60 and possibly 70; that is the formula.

The Court: I am afraid that might leave an impression of some particular speed, that is, in the evidence, but there is no particular speed in the evidence at all.

Mr. Hall: There is, because we have the skid marks showing where the skid marks were shown and then the point of impact.

(Testimony of Lieutenant Howard Jones.)

The Court: You can't generally take those facts and ask a hypothetical question, leaving your facts in there in a little different manner, but by agreeing to use that method——

Mr. Hall: I think it is evidence of speed, the fact that the bus driver applied his brakes as one witness said, and had a collision 260 feet distant. It shows that he was speeding.

The Court: That evidence shows that he kept his brakes on part of the time and released them part of the time.

Mr. Hall: It either shows one of two things, that either he was speeding or he should have applied his brakes, and had he applied his brakes the accident would not have occurred.

The Court: That would be for the Jury to determine.

Mr. Hall: We need this formula.

The Court: If you give the Jury a general formula by an expert, they can make their own computations.

Mr. Hall: I think it is the same thing.

The Court: Well——

Mr. Hall: What do you think, Mr. Carlton?

Mr. Carlton: Ask him to give his formula at least on 50 miles an hour and then have the Jury—if you increase the distance,—in other words, candidly I think—I haven't—I wouldn't know how to work it out myself.

The Court: Then, the formula, if you want to consult with him, you can do that.

(Testimony of Lieutenant Howard Jones.)

Mr. Hall: Let us ask him if he has a formula. I don't believe he did.

Mr. Baker: He did. He gave us the square and he said each time you increase your speed, it is a certain speed.

Mr. Hall: Let us try it.

The Court: Ask him again.

(Thereupon counsel returned to their seats.)

Q. Mr. Jones, do you have a formula for determining the speed of motor vehicles?

A. Yes, sir, I have.

Q. What is the formula?

A. Well, what type of speed, sir, do you want computed?

Q. Well, the speed of a motor vehicle under proper braking conditions.

A. We have quite a few formulas on that. I can, oh, base it entirely on the skid marks where you take the skid marks of the vehicle, measure them, multiply by the shift of the weight of the car. You make the application on the brake and 60 per cent of the job in the front and 40 per cent remains in the rear. [186] The 60 per cent makes it shift. You drag it down to each wheel. You allow 30 per cent for each front wheel and 20 per cent for each rear wheel. You multiply the skid marks times the person, the weight, times the coefficient friction, which is measured in percentage, and then you arrive at your number. Naturally you have to point out four decimal places. After

(Testimony of Lieutenant Howard Jones.)

you arrive at four places, you add those numbers. Count off, point four, extract the square root of that number, and multiply it by 5.47, which is the square root of 30, and one thing, we call it the empirical constant, and this empirical constant, as I have described yesterday, is the application of your car at 30 miles per hour if the energy was directly under it, would raise it 30 feet in the air.

Q. Does the formula determine how far it would take to stop a car that was traveling 20 miles per hour; is that the basis from which you start all your calculations, at 20 miles per hour.

Mr. Baker: Why not get him down to the skid marks formula; that is the one everybody understands. He testified yesterday about the skid mark formula.

Q. What did you testify about where you start your calculation from? [187]

A. We start our desk calculation of 20 from an observation test. We take a vehicle and take it out and make a test with it. As I said, many vehicles will stop within 20 feet, but the braking distance is within 20 feet, one foot more or one foot less; that depends on the amount of efficiency in the brake drum. If it stops short of 20 feet, that vehicle will stop in a smaller distance than at any other given speed. It doesn't make any difference.

Q. At 20 miles, where would it stop.

A. What?

Q. At 20 miles, where would it stop?

A. The braking distance would be about 20 feet.

(Testimony of Lieutenant Howard Jones.)

Q. Now, then, you give the Court and Jury this formula from which you go from 20 to any other figure above 20; give us the formula by which you can go from 20 to any other figure.

The Court: You mean the formula that can be computed——

Mr. Carlton: The formula by which any person can compute the same distance he arrives at by taking another speed.

Q. At 40, what would you have arrived at, a conclusion at 40.

A. As I stated previously, at 20 miles per hour you can stop your vehicle at approximately 20 feet. I am figuring that with 75 per cent efficiency in the brake drums. That is not considered too good. It is considered good brakes, but not exceptionally good. As I stated, the stopping distance or braking distance varies as to the square of the speed. I mean, if you stop at 20 miles an hour in 20 feet, you cannot stop your vehicle at 40 feet at 40 miles an hour, because that amount of time—that amount of speed is twice as great as our basic figure of 20. You have to square that to give us this twice as great. What it would actually be is the square of 2, which is 4, and multiply it 4 times by the 20 feet, you basically started at, at 20 miles per hour, and you have a braking distance of 80 feet.

Q. That is at 40 miles per hour? A. Yes.

Q. Now, how would you arrive at 60 miles per hour?

A. By the same process. Sixty miles per hour

(Testimony of Lieutenant Howard Jones.)

is 3 times as fast as 20 miles per hour and you have to square your 3, which gives you a 9, and multiply 9 by 20 and that gives 180 feet.

Q. So, it is your contention that if it was traveling at 60 miles per hour with the brakes applied, and they [189] are efficient, you would stop within 180 feet? A. Yes.

Q. The fact that there were dual wheels, would that increase or decrease the time of stopping?

A. They should stop in a lesser distance because there is more surface dragging on the pavement, which would create the tendency to stop more easily.

Mr. Carlton: You may have the witness.

Cross-Examination

By Mr. Baker:

Q. Lieutenant Jones, I believe you stated that in—wait a minute—first I will ask you this: I believe you stated yesterday, the cars proceeding at 50 miles per hour, it travels 75 feet per second, is that right?

A. No, sir; I believe my answer was approximately 70 feet per second.

Q. Seventy, all right. And I believe you further stated that you arrived at that by simply multiplying the number of feet in a mile by the number of miles and then dividing it by the number of seconds?

A. Yes, you can arrive at that figure, yes.

Q. That is a very simple process to arrive at that? A. Yes.

(Testimony of Lieutenant Howard Jones.)

Q. I believe you further stated that a driver of an [190] automobile or bus or any other vehicle, being met with an emergency or impending danger, it takes him three-quarters of a second for his mind to coordinate to apply that brake?

A. That is right, sir.

Q. If a man was traveling 50 miles per hour and was met by some sort of emergency, that car would travel approximately 51 feet before his mind coordinated a sufficient amount to apply the brakes, is that right, approximately?

A. If the mathematics is correct, that is correct.

Q. I think they are, and then, I believe you further stated, the distances at which a car can stop, have you actually ever seen that demonstration on an 18,000 pound vehicle?

A. Yes, sir.

Q. You have?

A. Yes, sir. I say 18,000 pounds. I have seen demonstrations of buses that were comparable to the buses that normally run in and out of El Paso.

Q. But, of course, when you talk about those distances you have to assume that the roads are of a certain character, is that right?

A. Yes.

Q. You have to assume that the brakes are in perfect [191] working order?

A. No, sir.

Q. Well, in good working order?

A. Yes, sir.

Q. And you have to assume that the weather is dry?

A. Yes, sir.

Q. In other words, there are many conditions that enter into it?

A. Yes, sir.

(Testimony of Lieutenant Howard Jones.)

Q. In determining that distance?

Mr. Baker: Will you give me those photographs, please? Thank you.

The Court: Are you through with the bulletin board?

Mr. Fowler: Yes, unless the witness wants to make a formula.

Q. I hand you Defendant's Exhibits B, C and D and ask you to examine those (indicating). You say you are familiar with the type of bus as shown in those photographs? A. Comparable.

Q. Comparable. Will you look at the front end of that bus, please. Would you say that after the collision which is apparent from those pictures, that there has been a collision between some kind of bus, is that right? [192] A. Yes.

Q. Look at the front end of that bus. From your knowledge of that bus, were there any brakes left on that bus after that collision?

A. Sir, I don't know.

Q. You wouldn't know, but from the looks of the front end, what would be your opinion?

The Court: What exhibit are you showing him?

A. I presume it is this one (indicating).

Q. This one is Defendant's Exhibit C, but look at those other exhibits which are B, C and D.

A. Well, I still wouldn't know.

The Court: I didn't get the answer.

Mr. Baker: He said he didn't know, he said he wasn't able to say. I think that is all.

Mr. Carlton: Come down, Mr. Jones.

Mr. Baker: I would like to recall Mr. Salas for some other questions on cross-examination. He is anxious to get away and I would like to do it now, if permissible.

The Court: You may.

CAPTAIN C. J. SALAS,

having been previously sworn, was recalled and testified as follows:

Recross-Examination

By Mr. Baker: [193]

Q. Mr. Salas, you are the same gentleman who testified yesterday as a witness?

A. Yes, sir.

Q. For the plaintiff in this case. And you testified you went to the scene of the accident and examined the scene of the accident? A. Yes.

Q. To determine approximately the cause of the accident and the other matters that were involved? A. Yes.

Q. You also identified on Plaintiffs'—no, Defendant's Exhibit A in evidence, identified that as being a picture of the scene of the accident? And you likewise identified the point of collision on that picture with a blue cross, is that right?

A. Yes.

Q. You also identified a certain skid mark that appears just before that blue cross, is that right? A. Yes.

Q. You said you believed that was 5 feet long, that one skid mark? A. Yes.

(Testimony of Captain C. J. Salas.)

Q. Did you examine the road to determine whether there were any other skid marks except that one?

A. I went back up the road a ways and I saw no more skid marks. [194]

Q. You saw no more skid marks except this one?

A. There was quite a bit of traffic at the time I was making my investigation.

Q. And that was the only one you did see?

A. That is the only one I did see, yes, sir.

Mr. Baker: That is all.

Redirect Examination

By Mr. Carlton:

Q. Captain, you testified that you arrived at the point of impact, of this accident about 5:25——

Mr. Baker: No, 6:25.

A. 6:25.

Q. 6:25, and at that time none of the passengers injured or otherwise had been taken in?

A. None of them had been taken in, no, sir.

Mr. Baker: I don't believe this is proper rebuttal or redirect.

The Court: You may proceed.

Q. Were the cars gathered up there?

A. A big number of cars all around, trucks, cars, on both sides of the road.

Q. How many would you say was the most gathered around there at any time?

A. There was times there, there was 30, 40 cars.

Q. Captain, about how many cars were passing there at an hour? [195]

(Testimony of Captain C. J. Salas.)

A. In February they had a road check; 25-hour road check.

Mr. Baker: I object to that as immaterial and not proper redirect.

The Court: Objection sustained, to the question in that form.

Mr. Carlton: He wasn't answering my question. He was explaining——

Q. But during the first hour that you were there, approximately how many cars would you say passed going either east, west or both?

A. There were several. I would say there were over 200 cars that went by there.

Q. I believe you testified yesterday that you supervised the taking of all of these pictures that were introduced in evidence? A. Yes, sir.

Q. I believe you further testified it was about ten o'clock you made those pictures?

A. Yes.

Q. You gave your time in looking after the traffic and the injured and moving the wreckage and then had the pictures taken? A. Yes, sir.

Mr. Baker: I object to that as not being proper redirect. [196]

The Court: You have gone into all these matters.

Mr. Carlton: That is all.

Mr. Baker: That is all. As far as I am concerned, the Captain can be released.

Mr. Hall: If the Court please, I think counsel has agreed to stipulate with us as to what the American table of mortality shows. I will offer to

stipulate, if there is no objection by counsel, that a man forty-two, the life expectancy is 26.72. I might say in that connection, I asked Mr. Rumeh—forty-one——

The Court: Aged what?

Mr. Hall: Forty-two, and that the life expectancy of Mrs. Rhodes——

A Juror: I didn't hear you.

Mr. Hall: ——would be 24.54.

The Court: 24.54.

Mr. Baker: What age was she?

Mr. Hall: And she was the age of forty-five years or is now the age of forty-five years.

Mr. Baker: It may be so stipulated, if Your Honor please.

Mr. Fowler: Mr. Carlton is still out. He asked to be excused to talk to Mr. Salas. [197]

Mr. Baker: This would be a good time for a five-minute cigarette.

The Court: If it is a matter of life and death, yes.

Mr. Hall: If the Court please, I think we are through. If I could see Mr. Carlton and find out if he has any other questions to ask——

Mr. Fowler: If the Jury heard the stipulation—one Juror said "Louder."

A Juror: I can't hear you.

Mr. Fowler: Read the stipulation.

The Court: Read those figures.

The Reporter: 26.72.

The Court: Read the whole stipulation.

(The stipulation was read by the Reporter.)

The Court: Those figures are 26.72 years and also 24.54 years.

Mr. Baker: That's right.

The Court: Those figures refer to years.

Mr. Baker: That's right.

Mr. Hall: The plaintiffs rest.

(Thereupon the Plaintiffs rested.)

Mr. Baker: I have a motion to make, if the Court please, which I would prefer to make in the absence of the Jury. [198]

The Court: Very well, the Jury may be excused at this time with the admonition that you are not to discuss this case amongst yourself or with anyone else or to permit any person to discuss this case with you or in your presence. Furthermore, you are not to form or express any opinion on the merits of the case until it has been finally submitted to you for your deliberation. You are now excused until called by the Court.

(Jury out.)

DEFENDANT'S MOTION FOR DIRECTED VERDICT

Mr. Baker: If the Court please, the plaintiffs having rested now, therefore at the close of the plaintiffs' testimony the defendant moves the Court to direct a verdict in favor of the defendant on each of the causes upon the following grounds and for the following reasons:

One, there is no evidence adduced by the plain-

tiffs showing any negligent act on the part of the defendant.

Two, there is no evidence adduced by the plaintiffs showing that there was any excessive rate of speed.

Three, that it affirmatively appears from the testimony that any act upon the part of the [199] defendant, whether negligent or not, was not the proximate cause of the accident and injuries in question.

Four, upon the further ground that it affirmatively appears from the plaintiffs' testimony that the sole and proximate cause of the accident and injuries in question was not any negligent act upon the part of the defendant, but was by reason of the acts of a third person not under the control of the defendant.

Five, on the ground that the plaintiffs have not carried the burden of proof required of it in that they have not shown by a preponderance of the evidence that the defendant was negligent in any respect pleaded in the complaints, and they have not shown by a preponderance of the evidence that any act upon the part of the defendant was the proximate cause of the accident and the injuries in question.

That is the motion that I desire to present my argument on.

(Argument of counsel to Court.)

The Court: Well, we know that every case is judged by the evidence that is brought forth in the case. Now, there are no two cases exactly alike. The situations may be similar. In the [200] Alex-

ander case there are some similarities, but the facts are not as they are in this case. I hesitate to take the case away from the Jury. The Jury is called here to decide the issues in this case, and I think there are enough facts here to entitled the case to go to the Jury, the facts thus far brought forth. The motion is denied.

Mr. Hall: If the Court please, when would you want us to come back to start the argument?

The Court: He is still——

Mr. Hall: I meant to start the evidence.

The Court: I understand. Now, do you want to come back at one-thirty or one-forty-five?

Mr. Baker: I prefer one-forty-five.

The Court: I would like very much to complete the taking of the arguments and the evidence. How many witnesses do you have, Mr. Baker?

Mr. Baker: I only have two.

Mr. Fowler: And a deposition.

Mr. Hall: Do you think we can go ahead with our arguments and the instructions, too?

The Court: The instructions are being, as discussed, the instructions are being formulated and some of them that need typing are being typed. If you come in by one-forty-five you can look at them. I have done everything we have set out to do in our conference with reference to the instructions.

Well, we will take the recess.

The Bailiff: Do you want the Jury in?

Mr. Baker: You can tell them.—I will stipulate you can tell them that—the Bailiff can tell them to come back at 1:45.

Mr. Hall: We will stipulate.

(Jury in.)

The Court: We told the Jury—I think you better call them in.

The Court: It is stipulated that all the Jurors are present?

Mr. Baker: Yes, sir.

Mr. Hall: Yes, sir.

The Court: I think we have so stipulated on every session. Sometimes I can't keep track of it.

Mr. Baker: It may be stipulated as so, if we haven't.

Mr. Hall: Unless there is some—the Jurors were always present.

The Court: Gentlemen, we are going to take a recess until 1:45 and you are again excused until that time with the same admonition heretofore given. Is it necessary to repeat the admonition?

Mr. Baker: No.

The Court: Do you stipulate?

Mr. Hall: We stipulate.

The Court: Other than by reference, the admonition given you at each session, which I asked you to observe. You are now excused until 1:45.

(Thereupon Court adjourned at 11:55 o'clock a.m. and reconvened at 1:45 o'clock p.m.)

Afternoon Session

(Conference on instructions held in the Court's chambers.)

Mr. Hall: I stipulate for and on behalf of Mrs. Rhodes.

Mr. Fowler: And so do we on behalf of Mr. Rumeh.

Mr. Baker: And the defendant offers no exceptions to the instructions proposed to be given to the Court.

The Court: As exhibited by counsel at this conference. You want to say that you have withdrawn——

Mr. Baker: You have marked them.

The Court: The record should show.

Mr. Baker: The defendant withdraws his requested instructions No. 9. I think it was No. 9.

The Court: And do you want to stipulate that the instructions which you have inspected shall be given in lieu of those requested on both sides?

Mr. Fowler: That's right. We stipulate.

Mr. Baker: Will you read that please.

(Record read by the Reporter.)

Mr. Carlton: We do.

Mr. Baker: Yes.

Mr. Hall: Yes.

The Court: You can inspect them again before they are read and see that they are the ones that you have agreed upon.

Mr. Hall: At this time, if the Court pleases, on behalf of the plaintiff, Mrs. Rhodes, I will to make a motion to amend her complaint, to amend the Prayer of her complaint as follows:

“Wherefore, Plaintiff demands judgment against the defendant in the sum of \$25,050 and for her costs incurred herein.”

Mr. Baker: Is that your motion to amend in that respect?

Mr. Hall: Yes, sir. And this motion is made in order that the pleadings may conform to the proof heretofore offered by the plaintiffs.

Mr. Baker: We resist the motion and the amendment on the ground that there is no proof requiring [204] an amendment to the pleadings. The evidence is that the lady was a housewife; no loss of earnings; no loss of time; no reason to amend the Prayer of the Complaint to conform to any proof.

Mr. Hall: Further, if the Court please, it is our contention that the Prayer is really no part of the complaint and may be amended at any time by the plaintiff without regard to proof.

Mr. Baker: Why do you amend it then?

Mr. Hall: In order that the Court may instruct the Jury as to the demands of the plaintiffs.

The Court: Well, the demands generally are more in the nature of claims.

Mr. Baker: That's right.

The Court: The model of the demands is not to be taken as evidence of any specified amount in which—is an issue, but serves as a claim upon the part of the plaintiff or allotment; that is the purpose of it, and the Jury can't bring in a verdict in excess of that amount or claim or demand. I assume that they—that your theory in proposing that amendment is that you are now restricted to recover under your pleadings in the sum mentioned in your complaint unamended.

Mr. Hall: Yes. [205]

The Court: And that a verdict beyond that amount would not be a proper verdict; is that your contention?

Mr. Hall: Yes. Off the record, please.

(Further discussion had off the record.)

Mr. Hall: Your Honor, if the Court please, I would like to make it in the form of an amendment, whether it is necessary or not.

The Court: Well, the courts are liberal with amendments.

Mr. Baker: If necessary to conform to proof, but does the proof justify an increase in his demand?

Mr. Hall: Of course, that is a question for the Jury. I don't know what a broken back is worth, nor does anybody else.

Mr. Baker: You allege it in your complaint.

The Court: I am inclined to grant the motion. Will you file your written amendment?

Mr. Hall: I will during the course of the trial.

The Court: You may do that later.

Mr. Hall: Is it necessary to re-write the entire complaint?

The Court: No, just this amendment. [206]

Mr. Fowler: Now, then, if the Court please, may we also have a stipulation between the counsel for the defendant, Mr. Baker, and ourselves, in the Rumeh case, Mr. Carlton and Mr. Fowler, that the amount owed Dr. Long of El Paso by George Rumeh is the sum of \$350?

Mr. Baker: It is so stipulated.

The Court: You can renew that in the presence of the Jury. The Jury should hear that stipulation. Anything further, gentlemen?

Mr. Baker: That is all.

The Court: Is it stipulated that all the jurors are present?

Mr. Baker: Yes.

Mr. Hall: Yes, Your Honor.

The Court: Is there a stipulation that you desire to have read or repeated in the presence of the Jury?

Mr. Fowler: Yes, if the Court please, it is stipulated between counsel for the defendant, Mr. Alexander Baker, and ourselves, Mr. Carlton and myself, on behalf of George Rumeh, that Mr. Rumeh paid or owes Dr. Long of El Paso the sum of \$350.

Mr. Baker: It is so stipulated.

The Court: Are you ready to proceed? [207]

Mr. Baker: Yes, Your Honor. The plaintiffs have rested, I understand.

Mr. Fowler: Yes, we have rested.

Mr. Baker: May I make a brief statement to the Jury of what I expect to prove?

The Court: You may.

DEFENDANT'S CASE

(Thereupon counsel for the defendant made an opening statement to the Jury.)

The Court: You may call your first witness.

Mr. Baker: I will call Mr. Boone.

WILLIAM M. BOONE

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

(Testimony of William M. Boone.)

Direct Examination

By Mr. Baker:

Q. State your name, please?

A. William M. Boone, Jr.

Q. Where do you reside, Mr. Boone?

A. At 1720 West Elm Drive, Phoenix, Arizona.

The Court: Will you spell your last name, please?

The Witness (spelling): B-o-o-n-e.

Q. What is your age, Mr. Boone?

A. I am now 29 years of age.

Q. By whom are you employed? [208]

A. The Salt River Valley Water Users Association, Light and Power Company and Irrigation District at Phoenix.

Q. At Phoenix? A. Yes.

Q. In what capacity?

A. Power services and irrigation water.

Q. How long have you been employed by the Water Users Association?

A. Well, let's see, it was August 28, 1939.

Q. Have you heard all the testimony in this case, Mr. Boone?

A. Yes, sir, I have been here through most all the testimony.

Q. And you have heard the accident described?

A. Yes, sir.

Q. You heard the bus described——

A. Yes, sir.

Q. That was involved? A. Yes, sir.

Q. Were you on that bus? A. Yes, sir.

(Testimony of William M. Boone.)

Q. And at that time where was your residence?

A. I had just been discharged from the army, but my residence was considered the same as it is now. [209]

Q. And this accident occurred on March 25, 1946, did it, Mr. Boone?

A. Yes, sir, to the best of my knowledge.

Q. Where did you board the bus?

A. At Phoenix, Arizona.

Q. You were destined to what point?

A. Charlotte, North Carolina.

Q. Was Mr. Bach driving the bus when you left Phoenix?

A. I understood—no, sir,—excuse me.

Q. He was not? A. He was not.

Q. Where did he take charge of the bus, if you know? A. I don't.

Q. You don't know? A. No.

Q. You do know Mr. Bach, now?

A. I know him now.

Q. Did you know him at the time of the accident?

A. I didn't know him personally. I understood from the driver that he was the driver of the bus. I was naturally interested to know who was driving the bus.

Q. You recall the bus making a stop at Deming?

A. No, sir, I could not. [210]

Q. Do you know approximately where the accident happened? A. Yes, sir.

Q. Where?

(Testimony of William M. Boone.)

A. Approximately 8 miles west of Las Cruces, New Mexico.

Q. Now, before the time of the accident, where were you sitting?

A. I was sitting on the right-hand side of the bus itself, about middleways back in the seat next to the center aisle. The bus was not occupied with very many passengers and I had a seat all to myself.

Q. You were sitting next to the aisle?

A. Next to the aisle.

Q. You say you were half way back in that bus?

A. Yes; I am not sure; about four or five seats back.

Q. From the driver?

A. From the front. I was on the opposite side of the driver.

Q. State, if you know, at what rate of speed the bus was traveling before the time of the accident.

A. I estimated that speed at approximately 40 to 45 miles per hour.

Q. I will ask you whether or not there was anything in connection with the operation of the bus before [211] the time of the accident that gave you any sense of danger or fear of any kind?

A. No, sir.

Q. Now, Mr. Boone, will you please state exactly what you first observed and what occurred at this time at this point 8 miles west of Las Cruces? First, I will ask you what time of day it was?

A. It was late in the afternoon. I didn't know

(Testimony of William M. Boone.)

the exact time, but I heard that the accident happened at 6:10.

Q. Was it broad daylight? A. Yes, sir.

Q. Was the road at that point straight?

A. Yes, sir.

Q. Well, now, state—first, I will ask you, if you observed a car approaching the bus from the east, that is, proceeding in a westerly direction?

A. Yes, sir, I did.

Q. Do you know what kind of a car that was?

A. I didn't know the make. I know that it was a brown coupe.

Q. What caused you—now, where was that brown coupe when you first observed it with reference to being on the north or south side of the highway?

A. It was very definitely on the north side of [212] the highway on the car's right-hand side of the road, very close to the edge of the pavement.

Q. Now, when you refer to a car, you are referring to this coupe, are you? A. Yes.

Q. Now, when you first observed it, can you estimate the distance between that car and the bus? In other words, how far was the bus from the car?

A. I estimate that distance as 60 yards, 180 feet.

Q. What first called your attention to this car?

A. A slight puff of dust that made me think that there might have been a blowout or that he had gone very close to the shoulder and picked up a puff of dirt with his right front wheel.

(Testimony of William M. Boone.)

Q. State then what happened as you observed it? Did you see that car from then on up to the time of the collision?

A. No, sir. I saw it until it disappeared under the front of the bus.

Q. You saw it up until the time the front end of the bus obstructed your view? A. Yes, sir.

Q. Describe, Mr. Boone, exactly what happened?

A. When I saw this puff of dirt come up from the right front wheel of this automobile, I saw it pull back to the paving or back towards the center of [213] the road fairly sharply and then it seemed to straighten out and come at a gradual arc across from the north side of the pavement into our line of travel. I yelled to the lady sitting across the aisle from me to look up.

Q. Never mind what the conversation was that you had. What did the bus driver do, if anything, Mr. Boone?

A. As best as I could judge, he applied the brakes and pulled sharply to the right.

Q. What was the speed of this brown coupe, if you know, compared to the speed of the bus, if you have no other way of judging.

A. I don't know the exact speed of it, but naturally I estimated the speed of the car between 45 and 55 miles per hour.

Q. That is this brown coupe?

A. That's right.

Q. Could you tell whether that coupe ever stopped or reduced its speed at any time?

(Testimony of William M. Boone.)

A. No, sir, it stands in my mind that there was no slackening of speed until it disappeared from my sight.

Q. Never slackened its speed once; that is the coupe? A. That's right. [214]

Q. What happened then, Mr. Boone?

A. We had a terrific crash and a bump, and I ducked down beneath the seat, tried to stay out of the aisle. It seemed that for about six or eight seconds we were bumping along the side of the road and then everything came to a very quiet stop.

Q. Are you able to estimate the position of the bus at the time of the impact?

A. Yes, sir, I am.

Q. And where was that with reference to the south edge of the paving, if you know?

A. As the car disappeared from my view, which was the last time I was above the seat, the right front wheels and probably the right rear wheels of the bus were on the right-hand shoulder of the road that was off the hard surface. I know that by looking down the road I could see that we had left the black top.

Q. What was that last?

(Last part of the answer read by the Reporter.)

A. The paving.

Q. By that you mean the paving? A. Yes.

Q. Where was the bus when it came to rest, if you know?

A. It was entirely off of the paved road. The

(Testimony of William M. Boone.)

front [215] end was probably two feet further off than the rear duals. It was stacked right up on top of this brown coupe with the front end entirely torn out of the bus.

Q. The front end was entirely torn out?

A. Yes, sir. One of the more remarkable parts about the accident was that you could pull that much off of the front end of the bus and do it as cleanly.

Q. What became of the driver, if you know?

A. I only knew at a later date what became of him. At that moment, at the moment of the crash, I didn't go up front. I was more or less afraid to. I thought he would be dead.

Q. Did you see him afterwards there at the scene of the accident?

A. Yes, sir, I did, and I had heard what had happened to him.

Q. What was his condition?

Mr. Hall: We object to that, if the Court please, as being hearsay.

Q. You saw him there, didn't you?

A. Yes, sir.

Q. What was his condition?

A. Well, I don't know about his physical condition. I do know that he was very gravely interested in his [216] passengers.

Mr. Hall: Just a minute, if the Court please. I ask that that answer be stricken as not being responsive. I ask that answer be stricken as not responsive and he asked him what his condition was

(Testimony of William M. Boone.)

and he stated something else other than what his condition was.

The Court: That answer may be stricken. I think he talked to passengers.

Mr. Hall: Yes, sir.

The Court: I couldn't hardly hear him myself. Read the answer, Mr. Reporter.

(Record read by the Reporter.)

The Court: That answer may stand.

Mr. Hall: Then we ask that the portion of the answer that he was gravely interested in his passengers be stricken and that the other part be stricken. My original motion was to strike the whole thing. It seems to us his interest in passengers——

The Court: That in some manner is a description of his condition. It may stand.

Q. Now, at the time you first observed this brown coupe make a turn to the left, I will ask you whether or not the driver at that time attempted to swerve to his right? [217]

A. Our driver, the bus driver?

Q. Yes. A. Yes, sir, I think he did.

Q. Do you know whether at that time he applied his brakes?

A. The first notice of application of brakes was just momentarily before the impact.

Q. Just before the impact? A. Yes.

Q. When you noticed that the brakes were taking effect, is that right? A. Yes.

(Testimony of William M. Boone.)

Q. How much time expired, Mr. Boone, from the time this brown coupe swerved to the left to the time of the impact?

A. It was all momentarily; you could hardly judge any space of time there.

Q. Was it so immediate that you couldn't judge the space of time; was that your answer?

A. Yes, sir.

Q. You drive an automobile yourself, do you, Mr. Boone?

A. Yes, sir.

Q. And at the time of the accident had you been driving an automobile?

A. Yes, sir. [218]

Q. I will ask you whether or not there was any thing that this driver could have done to avoid this accident, anything at that time, in your experience as a driver?

A. In my opinion——

Mr. Hall: Just a minute. If the Court please, we object to that question as calling for an opinion of this witness.

The Court: Sustained.

Mr. Baker: You may cross-examine.

Cross-Examination

By Mr. Fowler:

Q. Mr. Boone, where do you live in Phoenix?

A. 1720 West Elm Drive.

Q. When did you live there; when?

A. Since the place was built in 1941, except for the time I spent in the army.

Q. How long were you in the army?

A. Thirty-one months.

(Testimony of William M. Boone.)

Q. Were you there in October of 1946?

A. Yes, sir.

Q. You were in North Carolina?

A. Yes, sir, and down to North Carolina.

Q. You had come home from North Carolina to see someone in Phoenix in March, 1946?

A. In April. [219]

Q. In April? A. Yes, sir.

Q. You stayed there from April until March 25, is that right? A. That's right.

Q. And you went back to North Carolina, is that right? A. Wait a minute now——

Q. From April, 1946, until you left on March 25?

A. I went in March, I went to North Carolina, I went back the——

The Court: Just a minute; I can't hear you. Speak a little louder, please.

The Witness: Do you want me to repeat it?

Q. No, just speak up. You had been in Phoenix up until March, 1946? A. Yes, sir.

Q. How long had you been there?

A. About two weeks.

Q. Visiting some members of your family?

A. Well, I was getting my army stuff straightened up, getting my sugar rations and so forth.

Q. And then you returned to North Carolina in March, 1946? A. Yes, sir. [220]

Q. And then when did you come back to Phoenix? A. In April.

Q. The next month? A. Yes, sir.

(Testimony of William M. Boone.)

Q. Were you discharged?

A. I had already been discharged.

Q. Had your father recently died?

A. My father died, well, during the war, back in 1941.

Q. You don't know Mrs. Ana M. Boones?

A. No, she is not one of our Boones.

The Court: I am going to ask both of you gentlemen to speak up.

Mr. Fowler: Thank you.

Q. Well, you got on the bus in Phoenix, is that right? A. Yes.

Q. With a ticket to where?

A. To what destination?

Q. Yes, sir. A. Charlotte, North Carolina.

Q. Change buses at El Paso?

A. I don't know whether we were supposed to or not. I think we did.

Q. You weren't injured, were you?

A. Will you repeat that? [221]

The Court: Read the question, Mr. Reporter.

(Last question read by the reporter.)

A. Only slightly.

Q. You did not—you weren't taken to the hospital in Las Cruces, were you? A. Yes, sir.

Q. By Captain Salas?

A. I came in on a bus that was sent out to pick up the uninjured passengers.

Q. The uninjured?

A. Well, the less injured, we will say.

Q. Then, were you looked over in Las Cruces?

(Testimony of William M. Boone.)

A. Yes, sir.

Q. Given some first aid? A. Yes, sir.

Q. You were cut on the face by the seat?

A. By my fingers, I presume. I had my hand up in front of my face.

Q. And dug in? A. Yes.

Q. When was that?

A. That was at the moment of the impact.

Q. You were down between the seats?

A. Yes.

Q. You knew there was going to be an impact?

A. Yes.

Q. How did you know that?

A. He was right in our face there. He couldn't get around us.

Q. Hadn't the car then disappeared underneath the hood of the bus? A. It had.

Q. How long before you got out?

A. Just as it went under the hood of the bus.

Q. How far was that from the bus?

A. I could only guess; it could be scientifically determined.

Q. How far would you estimate?

A. About, oh, I would say 15 yards ahead of the bus.

Q. About 60 feet? A. Forty-five feet.

Q. Twenty-five feet?

A. Forty-five feet, 15 yards.

Q. And it came from his side of the road?

A. Whom do you refer to as "him"?

Q. The brown coupe.

(Testimony of William M. Boone.)

A. The coupe came from its north side of the road to our south side of the road.

Q. Directly? A. On a long arc. [223]

Q. On a long arc? A. Yes, sir.

Q. How had it been traveling before it reached the bus? A. That would only be a supposition.

Q. Well, tell me what you saw.

A. The first time I saw it, it was on its side of the road.

Q. It was on the north side?

A. On the north side.

Q. And the bus was on the——

A. South side.

Q. South side. They were just driving along as two cars would? A. That is correct.

Q. It never wobbled at all?

A. I couldn't say that it did.

Q. Well, would you say that it did not at all?

A. I would.

Q. And that condition existed up until about 45 feet in front of the bus? A. No, sir.

Q. Well, how long?

A. Where it started to come towards us was just inside of approximately 60 yards ahead of the bus. It took a long arc and ended right up at our front door. [224]

Q. What did you say the driver did?

A. Applied his brakes and pulled to the right.

Q. When did he apply his brakes?

A. Just fractionally before the car hit us.

(Testimony of William M. Boone.)

Q. You were down then between the seats, I take it?
A. Yes.

Q. With your fingernails up in your forehead?

A. They must have been.

Q. When the impact happened like that, you dug them into your face, is that right?
A. Yes.

Q. Would you say a half second before the impact?
A. What half second?

Q. When the driver applied his brakes.

A. I would say that it was less than that before the impact.

Q. A quarter of a second?

A. That is too fine for my knowledge, but it was just like that (witness makes sounds like a smack).

Q. Could you distinguish between the application of the brakes and the impact of the car?

A. I thought that I could.

Q. You thought that you could? [225]

A. Yes.

Q. What do you think about it now?

A. I still think——

Mr. Baker: Just a minute; that is argumentative.

Mr. Fowler: He said he thought, so, I want to know what he thinks now.

The Court: You may proceed.

Q. Did he ever apply the brakes before?

A. Not to my knowledge.

Q. Didn't he apply them back about 260, 300 feet?

A. If he did, it was without my knowledge.

(Testimony of William M. Boone.)

Q. Were you sleeping? A. No, sir.

Q. What were you doing?

A. Talking to the lady across the aisle from me.

Q. Who was the lady across the aisle from you?

A. I don't know her name.

Q. Did you see her in the courtroom?

A. Well, I wouldn't recognize her.

Q. You don't know what her name was?

A. No.

Q. Were you sitting next to the window or next to the aisle? A. Next to the aisle.

Q. Who was sitting next to the window?

A. No one. [226]

Q. You moved over to talk to the woman?

A. Yes.

Q. Was she young? A. No, sir.

Mr. Fowler: I want to identify her. Would you say her name was Tuck? A. No, I would not.

Q. You wouldn't say what her name was?

A. I would say that it wasn't Tuck.

Q. Did she have anybody riding with her?

A. No, sir.

Q. How far back were you.

A. I was five or six seats back of the front seat on the right-hand side of the bus.

Q. You were on the opposite side of the driver?

A. Yes.

Q. And she was on the same side as the driver?

A. Yes.

Q. Were you busily engaged in conversation with her? A. Yes.

(Testimony of William M. Boone.)

Q. So, you didn't have any conscious recollection of the application of brakes back about a block, we would say.

A. That is what I said; it was without my knowledge if he applied the brakes beforehand. [227]

Q. You wouldn't say, then, that he didn't make the application? A. I would not.

Q. Where did this woman get on the bus?

A. That I don't know.

Q. Well, let us refresh your recollection; at Phoenix? A. Well, I couldn't say.

Q. Well, this side of Phoenix?

A. I think it was east of Phoenix someplace, but I don't know exactly where.

A. Well, Safford? A. I don't know.

Q. Lordsburg? A. I don't know.

Q. Deming? A. I don't know.

Q. You were about half way in the bus, then?

A. Yes.

Q. Five or six. Were there people between you?

A. Yes, sir.

Q. Did you see Mr. Rumeh there?

A. Not to my recollection.

Q. Rumeh is the man that sits behind me.

A. Yes, I know. [228]

Q. You didn't see him?

A. I don't remember him.

Q. You don't remember his getting on the bus at Globe, do you? A. No.

Q. Did you see him out on the ground in front of the bus? A. No.

(Testimony of William M. Boone.)

Q. Where did see Bach or Back, the driver?

A. Standing by the corner of the bus.

Q. You didn't see him on the ground, then?

A. No.

Q. You were still behind the seats?

A. I stayed in the bus until Captain Salas called us and told us to march and get on another bus.

Q. Anybody else in the bus? A. Yes.

Q. Did you see anybody in the bus besides you, then? A. I saw Mrs. Tuck.

Q. Do you know Mrs. Tuck when you see her?

A. Yes.

Q. Is she in the courtroom now?

A. She is back there (indicating).

Q. All right, go ahead.

A. I saw an unidentified couple with a small baby sitting behind me, and I performed some first [229] aid on the lady across the aisle.

Q. The one you had been talking to?

A. The one I had been talking to. I saw a sailor boy sitting behind me on the opposite side. I remember a young WAC that was sitting up in front of the bus, all of whom I don't know their names, and that is about all I remember.

Q. Was Mrs. Tuck sitting behind you?

A. No, sir, not to my knowledge. She was ahead of me on the opposite side of the bus.

Q. She was ahead on the left side?

A. Yes.

Q. On the same side as the driver?

A. That is what I mean.

Q. Did you see her down between the seats?

(Testimony of William M. Boone.)

A. No, sir.

Q. Maybe you and she got on at the same time?

A. Could be.

Q. That is when the driver made the first application of the brakes, at least 260 feet?

Mr. Baker: Wait a minute; we object: he never testified to anything. He testified if there was any brakes applied 260 feet, he didn't know anything about it.

Mr. Fowler: I was trying to test his credibility.

The Court: I think that question is objectionable.

Mr. Fowler: All right.

Q. Did you see her after the impact?

A. Who?

Q. Mrs. Tuck?

A. Yes, sir. She was passing out first aid, I believe.

Q. Where were you standing?

A. I was standing by the lady across the aisle from me.

Q. Trying to give her first aid? A. Yes.

Q. Did you see Mrs. Tuck bleeding about the month? A. Not to my knowledge, sir.

Q. Did you notice she had a tooth out?

A. No, sir. I heard she did, but I didn't notice it.

Q. When did you hear that?

Mr. Baker: We object to that as wholly immaterial and irrelevant.

The Court: Overruled.

Q. When did you hear that?

A. Later on in the bus amongst the passengers, that took us on in to the hospital.

(Testimony of William M. Boone.)

Q. Did she go with you then?

A. I don't know, sir.

Q. You don't know what became of her after you talked to her in the bus?

A. I can't remember if I did. [231]

Q. Did you see her get the first aid?

A. No, sir.

Q. Where were you?

A. Standing by the lady across the aisle from me.

Q. What were you doing to the lady across the aisle from you?

A. Attempting to stop some bleeding on the calf of her right leg.

Q. How about the baby with her?

A. There wasn't anything.

Q. There was a baby. You testified there was a baby. What happened to the baby?

Mr. Baker: He didn't testify to such a thing.

Mr. Fowler: He said that there was a baby sitting alongside of some woman on the bus.

Mr. Baker: I object to that; he never testified to that.

The Court: He testified that there was a woman.

Mr. Baker: He said that there was a couple sitting behind him with a baby.

The Court: Proceed with your examination.

Q. What happened to the babies?

Mr. Baker: What babies?

Q. The baby on the seat behind him; that is what he said.

A. There was only one and it was the luckiest

(Testimony of William M. Boone.)

[232] person in the bus. It was the least of the ones hurt.

The Court: Just a little louder; don't mumble your words.

Q. Was it a boy or a girl? A. I don't know.

Q. Did you ever see the baby?

A. Yes, sir, I saw the baby.

Q. You don't know whether it was a boy or a girl?

A. That is what I said in the last question.

Q. How old was the child?

A. I don't know.

Q. Was it seated with a man or a woman?

A. With both; I took them to be the father and mother.

Q. Oh, I see. How about the sun.

A. (No answer.)

Q. The sun (spelling) s-u-n?

A. I don't know.

Q. You don't know whether it was high up or low down or what? A. It was fairly low down.

Q. Where you heading into it?

A. That I don't know.

Q. Was it back behind you?

A. I don't know that.

Q. Do you know what time the accident happened at all? [233] A. I have heard.

Q. Did you have a watch? A. Yes.

Q. The same watch you have got there now?

A. Yes.

Q. Did you look at it?

A. Not to my knowledge.

(Testimony of William M. Boone.)

Q. When was the last time that you looked at it?

Mr. Baker: I don't think there is any dispute as to when the accident happened. What is the purpose of this?

Mr. Fowler: This, after all, if the Court please, is cross-examination of this witness. This witness is very hostile to my cause.

Mr. Baker: I object to his telling him he is hostile. The man tells the truth.

The Court: If you are testing his recollection, I wouldn't go too far afield.

Q. You don't remember what time it was or where the sun was or anything except that the car was coming at you when you first saw it, about 60 yards, is that right? A. That's right.

Q. On his right side of the road? A. Yes.

Q. You don't remember the application of the brakes [234] back west there, do you?

Mr. Baker: I object.

The Court: The last part of your question——

Mr. Baker: I object to his remembering. He said that he didn't remember any brakes being applied.

Mr. Fowler: He doesn't know.

Mr. Baker: He said——

The Court: I can't keep track of your questions. If there is an objection I will pass on it, but I don't like to hear this conversation back and forth. Make your objections and I will pass on your objections. Go ahead.

Q. Were you in uniform? A. Yes, sir.

Mr. Fowler: You may cross-examine.

(Testimony of William M. Boone.)

Mr. Hall: If the Court please, I would like to cross-examine this witness for and on behalf of Mrs. Rhodes.

The Court: You may.

Mr. Baker: Cross-examine?

Mr. Hall: Yes.

Cross-Examination

By Mr. Hall:

Q. Mr. Boone, do you know whether or not you were on time, whether or not the bus was on time when it [235] left Deming?

A. No, sir, I do not. I was in for a long trip; it didn't particularly bother me.

Q. Will you estimate the speed again of the bus at the time of the accident or just immediately prior thereto?

A. Will you repeat that question, please?

Mr. Hall: Will you read the question, Mr. Reporter, please?

(Last question read by the Reporter.)

A. I estimated it at between 40 and 45 miles per hour for the bus.

Q. You don't think it was going over 40 miles an hour, do you?

A. I can only say that I estimated it at between 40 and 45 miles per hour. If I could get that close to it——

Q. You testified in cases growing out of this accident before, haven't you, Mr. Boone?

A. No, sir, this is the first time only.

Q. This is the first time? A. Yes.

(Testimony of William M. Boone.)

Q. Who had you ever told what the speed of this bus was, before coming here today?

A. Probably my family. [236]

Q. And no one else?

A. Authorized representative of the Greyhound Bus Company, that talked to us.

Q. Mr. Baker?

The Court: Will you please keep your voice up. I have difficulty hearing you. You are all right for a while and then you drop your voice.

Mr. Baker: He told me, too.

Q. Now, Mr. Boone, was this bus going any faster or any slower at the time just prior to the accident than it had been going from Deming to the point of the accident? A. I couldn't say, sir.

Q. Had you noticed the speed of this bus after it left Deming except at this particular point?

A. Well, momentarily.

Q. How did you determine the speed of this bus at that particular time?

A. Well, I don't know; it is in your brain, I guess. When you see something is going to happen, certain things register on your brain.

Q. Well, as a matter of fact, you are very anxious to help the Greyhound Bus Lines?

A. No, sir; my only interest is in a straightforward tale of what happened. [237]

Q. How long have you been in Tucson attending this trial? A. Since Sunday.

Q. Who is paying your expenses?

A. I am at the present time.

Q. You expect to be repaid for them, don't you?

(Testimony of William M. Boone.)

A. I do.

Q. You haven't brought any suit against the Greyhound, have you? A. No, sir.

Q. And you don't intend to? A. No, sir.

Q. Did you talk to Captain Salas?

A. Yes, sir.

Q. When?

A. Oh, for three or four days I had a passing conversation with him every day.

Mr. Hall: Take the witness.

Redirect Examination

By Mr. Baker:

Q. You were asked the question, if you had sued the Greyhound Lines or intended to. Why don't you intend to sue the Greyhound Lines, Mr. Boone?

A. I figure I am an awfully lucky boy being here today and I don't believe in pushing my luck too far.

Mr. Fowler: That is all.

Mr. Baker: Just a minute.

The Court: That is all.

Mr. Fowler: Mr. Baker wanted another question.

Mr. Baker: Oh, I think that is all from Mr. Boone. May Mr. Boone be excused?

Mr. Fowler: Yes.

CODY BACH,

called as a witness on behalf of the defendant, having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Baker:

Q. State your name, please?

A. Cody Bach.

(Testimony of Cody Bach.)

Q. Your age? A. Thirty-seven.

The Court: How do you spell that name?

The Witness: (Spelling) B-a-c-h, your Honor.

Q. Where do you live?

A. 240 East Twelfth Street, Tucson, Arizona.

Q. Your occupation?

A. Bus driver for the Pacific Greyhound Lines.

Q. How long have you been employed by the Pacific Greyhound Lines? A. Since 1940.

Q. As a driver? A. As a driver.

Q. How many years' experience have you had as a bus driver altogether?

A. That is my first bus driving, but I have driven long trucks all my life.

Q. You have driven trucks most of your life?

A. Yes.

Q. You started bus driving in 1940?

A. Yes.

Q. Were you in the service?

A. Yes, three years.

Q. During what years were you in the service?

A. Forty-two and '43. I went in in '42 and came out in '45.

Q. Were you driving vehicles while you were in the service?

A. Yes, we had some of the army equipment to handle.

Q. You have heard the testimony in this case, have you not, Mr. Bach? A. Yes.

Q. All of the testimony? A. Yes.

Q. You are familiar with the accident that has [240] been described? A. Yes.

(Testimony of Cody Bach.)

Q. Were you driving the bus on that day?

A. Yes, sir.

Q. That is, March 25, 1946? A. Yes, sir.

Q. Where did you take charge of the bus?

A. Safford, Arizona.

Q. What was your tour of duty at that time?

A. Safford, Arizona, to El Paso, Texas.

Q. How long had you been rested before you took out this bus at Safford?

A. Well, you are required eight hours, so I had had at least eight hours.

Q. Before you took the bus at Safford?

A. Yes, maybe more: I don't recall the exact amount, but that is what you are required.

Q. What stops did you make on this day between Safford and the point of the accident?

A. Well, all my regular scheduled stops; Duncan, Lordsburg, Deming, Las Cruces, and El Paso. Those are the regular ones unless something occurs otherwise.

Q. Now, before the time of this accident, at what rate of speed were you traveling, Mr. Bach?

A. You mean before the accident occurred? [241]

Q. Yes.

A. Well, our average speed is 50 miles per hour. Our schedule is set for that, this average speed.

Q. You estimate that is what you were traveling, about 50 miles per hour?

A. Well, you would go that fast or sometimes faster, but that is an average speed.

Q. Did you see a car approaching that afterwards collided with you?

(Testimony of Cody Bach.)

A. Are you speaking of the time of the accident now?

Q. Yes.

A. Ten miles from Las Cruces this accident occurred.

Q. What was that, a Ford or what?

A. Well, at the time you wouldn't tell, but I seen later it was a Ford.

Q. Do you know whether it was a sedan or coupe?

A. Well, I am not certain.

Q. All right, now, before you observed this car, this Ford—we will refer to it as a Ford—did you pass any other vehicles on the road?

A. Well, how close a distance to this accident are you referring to, now?

Q. Well, did you pass anybody on the road?

A. I passed many a car on the road.

Q. Well, did you pass some car just shortly before [242] the time that you saw this Ford?

A. Well, just before the accident, I passed a trailer.

Q. Just state what you did when you passed the trailer?

A. In this particular case, you—as a rule—you just never slack up; you go by. In this particular case there was oncoming vehicles, so, it caused me to slow up. In that case, you see, you always shift into third gear because of the weight of the bus. You can't stay on like you do in a car, but you step down according to the speed.

Q. In this particular case, did you shift to third gear?

(Testimony of Cody Bach.)

A. I had to. When you get below 30, 40 miles per hour, you are required to shift into third gear. It is too slow to shift into high. You shift into third gear. But I had to get it back into high gear. It takes a time to roll because it is heavy equipment.

Q. At the time you observed this car, had you picked up your speed?

A. No, this was only a half mile after I passed this trailer, the accident occurred. It would take about that or longer to get going in full force again. [243]

Q. So, you hadn't picked up your full speed at the time? A. Well, not my full speed, no.

Mr. Fowler: We don't like to object, but he is leading the witness. We object to it.

The Court: It is somewhat leading.

Q. Well, state where this Ford was when you first observed it, Mr. Bach?

A. Well, I saw this Ford when I passed the trailer, a half mile down the road. It was the only oncoming vehicle at the time, coming down that particular stretch.

Q. How far were you from it?

A. Approximately a half mile.

Q. Where was the Ford at that time?

A. On its side of the road.

Q. By that you mean north or south of the road?

A. Let's see, it runs east and west there; it would be on the north side of the road.

Q. Well, did you see that Ford from then on; did you observe it? A. Yes.

Q. That was the only approaching vehicle, did I understand you correctly?

(Testimony of Cody Bach.)

A. That was the only approaching vehicle at that time.

Q. When you observed it for a half a mile, did you [244] see it from then on?

A. Oh, yes, the road is very clear from there on. You can see it if your vision is good.

Q. What was it with reference to daylight or night?

A. The sun set about 6:30, so, it was very low. The full sun was up yet.

Q. Was it broad daylight?

A. Broad daylight.

Q. Was the road straight or curved?

A. Straight.

Q. Was there anything to obstruct your view of this Ford that was approaching?

A. Nothing, after I passed the trailer.

Q. You saw it all the time?

A. That's right.

Q. Did you observe that Ford do anything on the part of that Ford that caused you to believe that there may be some danger? A. Nothing.

Q. That is at first. Did you at any time observe anything?

A. Only until before the collision is the first.

Q. Well, that is what I am referring to.

A. Well, within, I would say, approximately 40 to 50 feet, it suddenly swerved in front of the bus and [245] that was the first indication that he ever give that he was coming over.

Q. How far were you from the Ford?

A. Well, that is hard to say.

(Testimony of Cody Bach.)

Q. I believe you said 40, 50 feet?

A. That is what I say; that is the reason I say at the time he gave the indication, it was just 40, 50 feet.

Q. Did he ever give any warning at any time that he intended to make a left-hand turn?

A. None whatever. He just turned the car over there.

Q. What rate of speed was he traveling, if you know? A. I wouldn't know; a fast rate.

Q. The car was approaching, is that right?

A. Yes.

Q. Are you able to very accurately judge the speed of a car when it is coming to you?

A. Well, within ten miles probably.

Q. Well, now, what did it do? You say that he swerved to you or swerved into you?

A. Well, it was what you call a three-quarter angle; that is, sharp as you cut a car, if you cut it at a three-quarters angle, it doesn't take very long to get across the road. [246]

Q. You say he cut it at three-quarters of an angle?

A. He cut it at three-quarters of an angle.

Q. When you first observed him making this cut, what did you do, Mr. Bach, with your bus?

A. Well, I started pulling to my right and I guess anyone would do the same thing; if you are on that side of the road and see anything coming towards you, that is the first thought you have.

Mr. Hall: We object to what his imagination——

Mr. Baker: Yes, just answer the question.

(Testimony of Cody Bach.)

The Court: The objection is well taken. The answer is stricken.

Q. I will ask you again what you did do when you observed this Ford cut his car on this angle to his left?
A. Pull sharply to the right.

Q. Did you do anything else?

A. Well, I wouldn't recollect; I imagine I would go for the brake, that is the usual——

Mr. Hall: We object and we ask that, "I imagine I would go for the brake," be stricken.

The Court: That may be stricken and the jury is instructed to disregard it.

Q. What happened then, Mr. Bach? [247]

A. Well, in a few seconds, that is all there was to it. The car ran under the front end of the bus and that is all I can tell you.

Q. Do you have any independent recollection other than from examination of the road as to where you were when the Ford ran into you?

A. Yes; I would say that my front wheels were off of the pavement and I wouldn't say about the back; I would say the fronts were off.

Q. Off the paving, you mean the south edge of the paving?

A. On my right-hand side of the road, my front wheels were off.

Q. What do you next remember after the impact, or do you remember the impact at all?

A. Well, I knew I was going to hit it. I just remember that he was going to hit us. The next I remember I was sitting in front of the bus looking back.

(Testimony of Cody Bach.)

Q. That is the next thing you remember, you were sitting, lying in front of the bus?

A. That's right.

Q. You had no recollection of the accident?

A. Well, just the crash and that is all.

Q. Mr. Bach, from your experience as a driver, I will ask you whether there was anything you could have done to have avoided that impact? [248]

Mr. Hall: Just a minute; we object to that question as being improper, irrelevant, incompetent and immaterial.

The Court: I think that is a matter for the jury to determine; objection sustained.

Q. Mr. Bach, presuming that you just put on your brakes and stayed in the road without pulling to your right, do you know what would have happened?

Mr. Hall: I make the same objection and the citation or our authority in that case is the Universal Smelters.

The Court: Objection sustained.

Mr. Hall: It is not within the province of this witness to answer a question of that kind.

Mr. Baker: You may cross-examine.

Cross-Examination

By Mr. Carlton:

Q. Mr. Bach, you were thrown out of the bus?

A. That is right.

Q. What threw you out? A. The impact.

Q. And when you hit that Ford, if it was a Ford, that is what threw you out?

A. I would say that is it.

(Testimony of Cody Bach.)

Q. Where the bus went from the time of the impact [249] to where it stopped, it didn't have a driver? A. That's right.

Q. Then, it went right where the wheels were setting at, didn't it? A. Yes, sir.

Q. Mr. Bach, how long is that bus?

A. Thirty-eight feet.

Q. How wide is that bus?

A. Approximately 8 feet.

Q. Mr. Bach, at the time you first saw this on-coming Ford, were you driving with your left wheels on your side of the center mark or line of the street or highway? A. My left wheels?

Q. Yes. A. Yes.

Q. Now, how close would you say your left wheels were to the center stripe of the road?

A. Well, now, let's see—that there is a long question. You see, the pavement is about 18, 20 feet there, so, you see, that would give you a lot of room. I would say within a foot of it.

The Court: You asked, was there a center line? Was there a center line?

Mr. Baker: I don't believe so.

Mr. Carlton: Well, whether it is real or [250] imaginary, there is a center.

Mr. Baker: I don't believe there was.

Q. The next question. Mr. Bach, this Ford that you saw coming, how close do you estimate that Ford's left wheels were to that center line, whether real or imaginary?

A. Well, I wouldn't say.

(Testimony of Cody Bach.)

Q. Well, was it closer to the center line than it was to the north erge of the pavement?

A. I would say he was right in his direct line of traffic where he was supposed to be.

Q. You think he was, then an equal distance from the center strip to the edge of the pavement?

A. Probably so.

Q. And he was in that position during all the time until he swerved immediately to his left and in your path?

A. He never made no indication of swerving.

Q. And he didn't give you any signal?

A. None whatever.

Q. And he cut at right angles?

A. That's right.

Q. At right angles?

A. That would be left angle.

Q. I mean right angle, 90 degrees? [251]

A. That's right.

Q. He cut at an angle of 90 degrees as he went in front of you?

A. That would be right, 75, 90 degrees.

Q. It is your testimony further that at the time you struck him you were not entirely off the pavement, or were you off the pavement?

A. I said the front wheels were off the pavement.

Q. Were the rear wheels off the pavement?

A. They could have been; I couldn't say. I'm talking about the front wheels.

Q. Mr. Bach——

Mr. Carlton: Let me see the pictures, please, ma'am.

(Testimony of Cody Bach.)

Q. Mr. Bach, I hand you Defendant's Exhibit C and I will ask you to state whether or not that is a correct picture of the position in which the Ford was at the time the bus came to a complete and final stop (indicating)? A. That is.

Q. Does that show that the Ford was all clear across the bus, or that it was partially in front of the bus?

Mr. Baker: We object; that is purely argumentative. The picture speaks for itself. [252]

The Court: The objection is well taken.

Q. Then, it is your testimony that that correctly represents the position of the Ford?

A. That's right.

Q. And the bus at the time it came to a complete and final stop? A. That's right.

The Court: What exhibit was it you showed him?

Mr. Carlton: "C".

The Court: "C"?

Mr. Carlton: "C", your Honor.

Q. Did you get the names of all the drivers of the bus?

Mr. Baker: "Drivers" of the bus?

Q. I mean the passengers of the bus.

A. That is the first thing required.

Q. Did you get it? A. Yes, sir.

Q. You did it yourself?

A. Maybe not myself; I had Miss Tuck. She was a great help to me.

The Court: What was that?

The Witness: Mrs. Tuck was a great help to me, your Honor.

(Testimony of Cody Bach.)

Q. Does your company issue a book of manuals for drivers, manuals for showing the rules and regulations, Book No. 1? [253]

A. Yes, they have manuals for everything.

Q. Is this one of your company's manuals (indicating)? A. That's right.

Mr. Carlton: I would like to offer this as an exhibit (indicating).

Mr. Baker: Let me see it. Well, we will object to it on several grounds: one, it was not shown that it was a manual at the time of the accident. The one he shows is one effective January, 1937, and I think it is wholly immaterial and irrelevant. I don't see where there is any materiality at all, a great big book like that, in the issues of this case. You didn't intend to read the whole thing to the jury?

Mr. Carlton: Yes.

The Court: You object to it?

Mr. Baker: I object to it.

The Court: Is there parts of that manual that you want to introduce?

Mr. Carlton: Section 146.

The Court: Did you show it to counsel?

Mr. Baker: Well, what are you going to offer; Section 146?

Mr. Carlton: Yes. [254]

Mr. Baker: I object to that on the same grounds: no showing that was in effect at the time of the accident, and I object on the grounds it is irrelevant and immaterial to the issues in this case whether he gets the names of the witnesses or not. It is just an ordinary rule all the companies have to report an

(Testimony of Cody Bach.)

accident and to get the names and addresses of passengers. What has this to do with this case?

The Court: You have made your objection.

Mr. Baker: How's that?

The Court: You have made your objection.

Mr. Baker: Yes, sir.

The Court: I can't see any relevancy to it; objection sustained.

Mr. Carlton: Take the witness.

Mr. Hall: No questions. Yes, I do have one question.

Cross-Examination

By Mr. Hall:

Q. Mr. Bach, are you now employed by the Pacific Greyhound Lines? A. Yes.

Q. And you are here in Tucson in the employ of the Tucson Greyhound? A. Yes.

Mr. Hall: That is all. [255]

Mr. Fowler: Just a minute.

Q. How long had you worked for Greyhound before the time of the accident?

A. 1940, '41. You see, I went into service the latter part of '42.

Q. Did you drive a bus before you went into the service?

A. Not a big bus like this; a school bus, and trucks and that is the only thing.

Q. When did you start to work for Greyhound?

A. 1940.

Mr. Hall: That is all.

Mr. Baker: That is all, Mr. Bach. The defendant rests.

Thereupon the defendant rested.

Mr. Baker: Any rebuttal?

Mr. Fowler: We rest, if the Court please.

Mr. Hall: No rebuttal.

Mr. Fowler: No rebuttal.

Thereupon the plaintiffs rested.

Thereupon the defendant rested.

The Court: I guess this would be a good time for a short recess and then you will be ready to begin your arguments.

Mr. Fowler: Yes, your Honor. [256]

The Court: Gentlemen of the jury, we are about to take a recess and again you are admonished not to discuss the case amongst yourselves or allow anybody to discuss this case with you, and furthermore you are not to express any opinion until the case has been finally submitted to you for your decision. We will recess for ten minutes.

(Recess had.)

(In the Court's chambers.)

Mr. Carlton: I would like to substitute No. 7 for No. 3, but they are of the opinion it would properly cover it, but I would like for it to be substituted.

Mr. Baker: This one (indicating)?

Mr. Carlton: Yes.

Mr. Baker: I will object to this one. I will except to that one.

The Court: Which one is that?

Mr. Hall: We will leave it as it is.

Mr. Fowler: And let that remain as withdrawn.

It is No. 7, I think, and let it remain as withdrawn.

The Court: Withdrawn. You are satisfied with these instructions on the question of the speed law of New Mexico as incorporated in these two instructions, No. 3 and No. 6; is that correct? [257]

Mr. Hall: Yes, and we pass those instructions.

The Court: All right, you might look over those, Mr. Baker. I haven't arranged those in the order in which they will be read.

Mr. Baker: Okay. The record may show that I have no exceptions to the proposed instructions of the Court.

Mr. Hall: And for Mrs. Rhodes, I state exactly the same thing.

Mr. Fowler: And the same thing for Mr. Rumeh.

Mr. Baker: Now, if the Court please, at the close of all the testimony for both the plaintiffs and the defendant, the defendant renews its motion for an instructed verdict and again moves the Court to direct a verdict in favor of the defendant in each of the cases, upon the grounds and for the reasons stated at the time of the motion made at the close of the plaintiffs' case, and may it be stipulated that all objections and arguments will be deemed renewed at this time.

Mr. Hall: Yes, we so stipulate.

Mr. Fowler: We so stipulate.

Mr. Fowler: And may it also be stipulated that his motion is deemed made in open court?

Mr. Hall: We so stipulate.

Mr. Fowler: We so stipulate. [258]

The Court: The motion is denied. Now, we will go back into the courtroom.

(In the presence of the jury.)

The Court: Is it stipulated that all the jurors are present?

Mr. Fowler: Yes, they are.

The Court: Are you ready to proceed with the argument?

Mr. Hall: There is just one matter, if the Court please, I would like to state in the presence of the jury that the plaintiff, Mrs. Rhodes, had made a motion to amend the Prayer of her Complaint, and that the amendment has been granted by the Court. The Prayer has been amended as follows: "Whereby plaintiff demands judgment against the defendant in the sum of \$25,050, and for her costs incurred herein."

(Thereupon counsel for the respective parties made their arguments to the jury.)

The Court: Well, gentlemen of the jury, the case has not yet been completed. I thought we will take a recess until tomorrow morning at which time the Court will give you your instructions. So again I admonish you not to discuss this case amongst yourselves or with anyone else nor to permit anyone else to discuss this case with you in your presence [259] or hearing. Furthermore, you are not to form or express any opinion as to the merits of this case until the case has been finally submitted to you for your deliberation. You are recessed until tomorrow morning at 9:30. Please be in your seats at that time.

(Thereupon Court adjourned at 5:30 o'clock, p.m., Wednesday, November 3, 1948, and reconvened at 9:30 o'clock, a.m., Thursday, November 4, 1948.)

Thursday, November 4, 1948, 9:30 o'Clock, a.m.

The Court: Is it stipulated that all the jurors are present?

Mr. Baker: Yes, your Honor.

Mr. Fowler: Yes, your Honor.

The Court: Gentlemen, there is nothing to bring up before these instructions are given?

Mr. Baker: No, your Honor.

Mr. Hall: We have nothing further.

The Court: The case is closed as far as the evidence and the arguments are concerned. [260]

COURT'S INSTRUCTIONS

Weinberger, J.: Gentlemen of the Jury: It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you.

The jury must accept the instructions of the Court as comprising together a complete and correct statement of the law governing the case. You must not assume the existence of any law not stated in these instructions, nor speculate or guess as to what the law is. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

If during your deliberations, doubt should arise in your minds concerning the law upon any given question, you should so advise the Court, and the Court will then again read the instructions covering the questions as to which you may be in doubt.

This case presents several questions or propositions of law, and it is the duty of the Court to instruct you fully upon each proposition. Some propositions may be covered by only one instruction, while others may require several instructions. You must not allow yourselves to be influenced as to any question of law or fact by the number of instructions given you upon each question. The Court does not intend to stress the relative importance of any question of fact or law either by the number of instructions given you upon a particular proposition or by the order in which all of the instructions are given. You are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions, and as a whole, and to regard each in the light of all the others.

You must decide this case solely upon the evidence that has been received by the Court, and in accordance with the law as I state it to you.

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or positions of either party, [262] or any of the parties, you will not suffer yourself to be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as

to which witnesses are, or are not, worthy of belief; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

At times throughout the trial the Court has been called upon to pass upon the question whether certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings are are not to draw any inference from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which any objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course must not consider the same; as to any question to which any objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

You must not consider for any purpose any evidence which has been ordered stricken out by the Court; such matter is to be treated as though you had never known of it.

During the course of the trial, I have asked questions of certain witnesses. My object was to bring out in greater detail facts not then fully covered in the testimony. You are not to assume that I hold any opinion as to the matters to which the questions related.

You are not to draw any inferences from any

discussion by Court with counsel or from any statements or comments by the Court in connection with rulings upon objections to testimony. In making any such rulings by the Court, or by any comment by the Court in connection with any such rulings, the Court did not intend to express any opinion as to the facts of the case, or what your decision should be on the facts.

If any counsel has intimated by any question that certain hinted facts were, or were not, true, you must disregard any such intimation, and must not draw any inference therefrom; you must not consider as evidence any statement of counsel made in your presence, unless such statement was made as an admission or stipulation.

You are the exclusive judges of the facts and of the effect and value of the evidence, but you [264] must determine the facts from the evidence produced here in court.

A stipulation by and between counsel for the parties as to any facts is binding upon you, and those facts shall be deemed by you as true in all respects, and you are to rely thereon and are bound thereby insofar as those particular facts are concerned.

You are the sole judges of the credibility of the witnesses and the weight which is to be given to their testimony. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; by the character of his testimony, or by evidence affecting his reputation for truth, honesty and integrity or

his motives; or by contradictory evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable persons.

You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to a plaintiff or a [265] defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

A witness may be impeached by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness wilfully false in one material part of his testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; if you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if from the whole case, considering [266] the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of evidence.

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in

which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by such an opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it, if in your judgment the reasons given for it are unsound.

The plaintiffs, George Rumeh and Bertha Lucille Rhodes, originally brought separate actions against the defendant, Pacific Greyhound Lines, but as their causes of action arose from the same accident and the defendants in the suits are identical, the suits have been consolidated for trial.

The plaintiffs, in their complaints, allege in substance that the defendant was at all times mentioned in the complaints and now is a common motor carrier of passengers, operating in the States of Arizona, New Mexico and other states; they further allege that they, the plaintiffs, were, on the 25th day of March, 1946, paid passengers on a bus of the defendant, Pacific Greyhound Lines, which was then and there being operated and driven by an employee and agent of said defendant; that while said bus of the defendant was being driven and operated along a public highway in the vicinity of Las Cruces, Dona Ana County, State of New Mexico, the driver of defendant's bus so negligently and carelessly drove and operated the same that he caused the bus to collide with another motor vehicle upon the highway and that by reason thereof the accident described in the complaints occurred

resulting in the injuries and damages to the plaintiffs complained of in the complaints.

The defendant, in its answers, admits that it was a common carrier of passengers as alleged in the complaints and that it was operating the bus in question by and through an agent and employee, and that the plaintiffs were paid passengers upon said bus and that on or about March 25, 1946, while said bus was proceeding along a public highway in the vicinity of Las Cruces, New Mexico, there was an accident in which another motor vehicle proceeding in the opposite direction along said highway collided with said bus, but defendant denies that the driver of its bus or the defendant was negligent in any respect, and denies that plaintiffs, or either or them, was injured or damaged by reason of any act on the part of the defendant or its driver, and denies that any act upon the part of the defendant or its driver was the proximate cause of plaintiffs' [269] injuries and damages, if any there are, and denies that plaintiffs were injured or damaged as claimed in the complaints.

You are instructed that the burden is upon the plaintiffs not only to prove that the defendant was negligent as charged in the complaints, but further, the burden is upon the plaintiffs to prove that such negligence, if any, was the proximate cause of plaintiffs' injuries, if any. That is, even if you find that the plaintiffs were injured by reason of an accident occurring while they were passengers upon the bus of the defendant, Pacific

Greyhound Lines, yet, that is not sufficient to entitle plaintiffs to recover unless they go further and prove by a preponderance of the evidence that they were injured by reason of some act of negligence upon the part of said defendant as charged in the complaints, and if plaintiffs' injuries were due to some other cause, such as the act of a third person other than the defendant, or some unaccountable cause, and was not due to a negligent act of the defendant, then the plaintiffs cannot recover and your verdict should be for the defendant.

If, however, you find by a preponderance of the evidence that the defendant's driver was negligent and that such negligence was a proximate cause of the accident and the resulting injuries of the plaintiffs, you must find for the plaintiffs, even though you find from the evidence that the driver of the Ford car may have been guilty of negligence and that his negligence contributed to the accident and resultant injuries of plaintiffs.

The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein.

You are instructed that negligence is never presumed and it is the duty of any party claiming negligence to establish that fact by a preponderance of the evidence, and in this case the lone fact that plaintiffs were injured while passengers upon a bus of the defendant is not sufficient to justify you infinding that defendant is liable for the in-

juries unless you further find from a preponderance of the evidence that such injuries were proximately caused by some negligent act of the defendant as charged in the complaints.

You are instructed that the defendant is not liable for an unavoidable accident. In this case even though the plaintiffs were injured without a fault on their part, yet a verdict cannot be rendered against the defendant unless the jury find from a [271] preponderance of the evidence that the injuries to plaintiffs were by reason of negligence on the part of the defendant as charged in the complaints. If the injury to plaintiffs was by reason of an unavoidable accident beyond defendant's control, then there was no negligence and your verdict must be for the defendant.

You are instructed that the defendant is not liable for injuries caused by a third person not an employee or servant of the defendant. Therefore, you are instructed that even if you find that plaintiffs were injured as charged in the complaints, but you further find that such injuries were solely due to the act of some third person not a servant or employee of the defendant, or were caused by a negligent act for which defendant is not responsible, then the defendant is not liable for plaintiffs' injuries, if any, and you shall return a verdict for the defendant.

You are instructed that a common carrier is not the insurer of the safety of passengers while being transported, and unless the carrier is guilty

of negligence which was the proximate cause of the injury received, it is not liable. [272]

All that is required of a common carrier is that it exercises the highest degree of care which a reasonably prudent and careful person would, under like and similar circumstances, exercise, to carry passengers safely. If this defendant did exercise such care then it is not liable although an accident happened and plaintiffs were injured.

A common carrier is not the insurer of the safety of passengers, while being transported and unless the carrier is guilty of negligence which was the proximate cause of the injury received, it is not liable.

All that is required of a common carrier is that—I think that is repetition. That is the same one. I am sorry, that is a repetition of the instruction I have just read, which was retyped, and everything I have already stated is already in No. 15. I had them together for the purpose of comparison.

Mr. Baker: That is all right.

Mr. Hall: That is all right.

The Court: I am sorry I read that. It was a copy of the charge I had already read to you.

You are instructed that while the law is very strict and stringent as to the duties it imposes upon common carriers for the safety of passengers, yet there is no absolute warrant of safety imposed. There are certain risks and dangers to which passengers are necessarily exposed for which a carrier is not and ought not to be liable. These are the perils against which human sagacity cannot

provide or the utmost care prevent. Every passenger must and does assume the risks incident to the mode of travel he selects and which cannot be avoided or prevented by the utmost skill on the part of the carrier.

You are instructed that a person faced with a sudden emergency, which emergency was not caused by him, is not expected to use and exercise the same calm and cool judgment which a person should exercise when not faced with such emergency, and in this case if you find from the evidence that the driver of the motor bus of the defendant, Pacific Greyhound Lines, was faced by a sudden emergency, which was not caused by his act, he is only called upon to exercise the highest degree of care which a reasonably prudent and careful man would exercise under the same circumstances; that is, a reasonably prudent and careful man who was faced with the same sudden emergency as the driver of this motor bus, if you find there was any such emergency.

You are instructed that negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a [274] reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.

You are instructed that the proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient inter-

vening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies.

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the parties making the charge, then they have failed to fulfill their burden of proof. To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent or, if it was, its negligence [275] was not a proximate cause of the accident, as it is that some negligence on its part was such a cause, then a case against the defendant has not been established.

The defendant Pacific Greyhound Lines is a corporation and as such can act only through its officers and employees, who are its agent. The acts and omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is.

You, Gentlemen of the Jury, are instructed that if you find that the plaintiff, George Rumeh, suffers from some unfortunate condition, which has not been proximately caused by negligence on defendant's part, although inviting your sympathy, you may not assess any damages for that condition.

However, if negligence on defendant's part has been a proximate cause of aggravating a previously existing disability suffered by said plaintiff, that effect should be considered by you in fixing damages, if your decision on the question of liability requires you to fix damages.

You, Gentlemen of the Jury, are instructed that if you find from the preponderance of the evidence that the plaintiffs, or either of them, were injured through the negligence of the defendant and that such [276] negligence was the proximate cause of plaintiffs' said injuries, it shall then be your duty to fix the amount of the damages, if any, to be awarded to said plaintiffs, or either of them.

There is no fixed or definite rule that can be given you with reference to the amount of damages to be awarded to a plaintiff in a suit for injuries to the person. It rests in the sound judgment and fairness of the Jury to determine what amount will fairly compensate said plaintiff for the personal injuries sustained, if any. No damages can be given by way of punishment, but only damages that will fairly compensate the plaintiff for the injuries sustained, if any, which amount must be determined by you after considering all of the evidence in the case. In estimating such damages you are to consider the health and condition of the plaintiff before the injuries complained of as compared with such plaintiff's present condition in consequence of said injuries, also the physical and the mental suffering to which such plaintiff may have been subjected or will be subjected in the future by reason of such

injuries, if any, together with the expenses of services of physicians, surgeons, hospitals and medicines, if any, to which such [277] plaintiff may have been subjected or will be subjected in the future as a result of such injuries, and any damages allowed by you must not exceed the amount claimed in the complaints on file herein.

You are instructed that the law in New Mexico, where the accident occurred, is as follows:

“The driver or operator of any vehicle in or upon public highways within this State, shall drive or operate such vehicle in a careful manner with due regard for the safety and convenience of all vehicles or traffic upon such highways.”

You, Gentlemen of the Jury, are instructed that the speed at which a vehicle travels on a highway considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of the negligence or of the exercise of ordinary care. Whether that rate of speed is a negligent one is a question of fact, the answer to which depends on all of the surrounding circumstances in the case. You are instructed in this connection, that the speed law of New Mexico at the time of the accident was forty-five (45) miles per hour.

In some of these instructions I may have used the masculine term “him” or “he” when speaking of a witness or litigant. In this connection you are to [278] consider the instructions as applying to all witnesses, or litigants, and to the feminine as well as the masculine, unless a particular witness or litigant is mentioned by name.

According to the American Experience Table of Mortality, the expectancy of life of a person aged 45 years is 24.54 years; and the expectancy of life of a person 42 years is 26.72 years.

This fact, on which the Court takes judicial notice, is now in evidence to be considered by you in arriving at the amount of damages, if you find that each or either of the plaintiffs, Bertha Lucille Rhodes, and George Rumeh, are entitled to a verdict.

However, the restricted significance of this evidence should be noted. Life expectancy shown by the mortality tables is merely an estimate of the probable average remaining length of life of all persons in our country of a given age, and that estimate is based on not a complete but only a limited record of experience. Therefore, the inference that may be drawn from the tables applies only to one who has the average health and exposure to danger of people of that age. Thus, in connection with this evidence, you should consider all other [279] evidence bearing on the same issue, such as that pertaining to the occupation, health, habits and activity of the person whose life expectancy is in question.

It is your duty to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be in-

fluenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

The attitude and conduct of jurors at the outset of their deliberations are a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain [280] verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to the Court, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the Court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth.

In order to return a verdict, or verdicts, it is necessary that each juror agree thereto. Your verdict or verdicts must be unanimous as to each litigant.

The fact that you will be given several forms of verdicts is not to be taken by you to indicate that the Court has any opinion that there is evidence to support any one particular verdict.

When you retire to your jury room to deliberate, you will select one of your number as foreman, who will represent you as your spokesman in the further conduct of this case in this court. If it becomes [281] necessary during your deliberations to communicate with the Court, do not indicate in any manner how the jury stands, numerically or otherwise.

When you have agreed upon your verdict or verdicts, the same will be signed by your foreman and you will also date the verdict, and you will return with such verdict or verdicts into court.

The forms of verdict that have been prepared are as follows—there are 1, 2, 3, 4 forms. In the case of George Rumeh against the Pacific Greyhound Lines, a corporation, “We the Jury duly impaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff George Rumeh and assess his damages at blank dollars, blank form.” In the same case, the other form of verdict is as follows: “We the Jury duly impaneled and sworn in the above-entitled action, upon our oaths do find for the defendant.” In the case of Bertha Lucille Rhodes against the Pacific Greyhound Lines, a corporation, one form is as follows: “We the Jury duly impaneled and sworn in the above-entitled action, upon our oaths do find for the plaintiff Bertha Lucille Rhodes and assess her damages at blank dollars.” The other form reads as follows: “We, the

Jury, duly impaneled and sworn in the above-entitled action, upon our oaths [282] do find for the defendant."

The Court: Will counsel step forward, please.

(Thereupon Court and counsel conferred as follows):

The Court: Are there any objections to any instructions or are there any demands?

Mr. Hall: Not to my knowledge.

Mr. Baker: The defendant has no exception.

Mr. Fowler: We have none.

The Court: You are satisfied.

Mr. Fowler: Did you say whether the Jury may have the exhibits, x-rays, and so forth? Do you wish to tell them that?

The Court: If they may wish to.

(Addressing the Jury.)

I will advise the Jury that if you desire the exhibits in the jury room, they will be delivered to you.

Now, the alternate juror, Mr. Adamson,—there will be no further need for your further services in this case and you are now discharged from further service in this case.

Mr. Adamson: That means that I can leave town?

The Court: You can leave now.

Mr. Adamson: I will be notified when to come again? [283]

The Court: You will be notified when you shall serve again.

The officers will take charge of the Jury and they will be sworn.

The Clerk: The bailiff has been sworn.

The Court: The bailiff has been sworn?

The Clerk: Yes, sir.

The Court: You are now to retire and deliberate.

CERTIFICATE

State of Arizona,
County of Pima—ss.

I, Alex E. Weiss, do hereby certify that I was duly sworn as official Court Reporter in the United States District Court, District of Arizona, and that as such official Court Reporter I attended the trial in the foregoing entitled causes; that while there I took down in shorthand all the oral testimony adduced, and proceedings had; that I have transcribed such shorthand into typewriting, and that the foregoing typewritten matter contains a full, true and correct transcript of my shorthand notes so taken by me as aforesaid.

/s/ ALEX E. WEISS,
Official Court Reporter.

[Endorsed]: Filed April 1, 1949. [285]

[Endorsed]: No. 12237. United States Court of Appeals for the Ninth Circuit. Pacific Greyhound Lines, a corporation, Appellant, vs. George Rumeh, Appellee. Pacific Greyhound Lines, a corporation, Appellant, vs. Bertha Lucille Rhodes, Appellee. Transcript of Record. Appeals from the United States District Court for the District of Arizona.

Filed May 9, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12237

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

GEORGE RUMEH,

Appellee.

Consolidated

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

BERTHA LUCILLE RHODES,

Appellee.

CONCISE STATEMENT BY APPELLANT OF
POINTS UPON WHICH IT INTENDS
TO RELY UPON APPEAL

Now Comes Pacific Greyhound Lines, a corporation, appellant above named, by its attorneys, and in accordance with Subdivision 6 of Rule 19 of the Rules of this Court, hereby states that upon its appeal it intends to rely upon the following points:

1. That the trial court erred in denying defendant's Motion for Continuance of Trial for the reason that the testimony of an absent witness was material to the defense of the above causes, and the defendant was prejudiced by the refusal of the court to grant time to procure the presence of such witness.

2. That the court erred in denying defendant's Motion for Instructed Verdict in each of above cases made at the close of plaintiffs' evidence, for the reason that plaintiffs' evidence was not sufficient to sustain or establish a cause of action or legal claim against the defendant.

3. That the court erred in denying defendant's Motion for Instructed Verdict in each of above cases made at the close of all the evidence, for the reason that the evidence was not sufficient to sustain or establish a cause of action or legal claim against the defendant.

4. That the evidence is insufficient to support the verdicts or judgments rendered and entered in the above causes, and the said verdicts and judgments are not justified by the evidence and are contrary to the evidence and the law.

5. That the court erred in denying defendant's Motion for Judgment for Defendant Notwithstanding the Verdict and for Judgment in Accordance with Motion for Directed Verdict made in each of the above causes, for the reasons set forth in said Motions and for the reasons set forth in Paragraphs 2, 3 and 4 hereof.

6. That the court erred in refusing to render and enter judgment for the defendant in each of the above causes in accordance with Motion for Directed Verdict made in each of said causes at the close of all the evidence, for the reasons assigned in Paragraphs 2, 3, 4 and 5 hereof.

7. That the damages awarded the plaintiff in each of the above causes in the verdict of the jury

rendered in each of said causes are excessive and appear to have been given under the influence of passion or prejudice.

8. That the court erred in denying defendant's Alternative Motion for New Trial made in each of the above causes, for the reasons set forth in said Motions and for the reasons set forth in Paragraphs 2, 3, 4, 5, 6 and 7 hereof.

Dated at Phoenix, Arizona, this 7th day of May, 1949.

BAKER & WHITNEY,

By /s/ ALEXANDER B. BAKER,
Attorneys for Appellant.

[Endorsed]: Filed May 9, 1949. Paul P. O'Brien,
Clerk.

No. 12,237

IN THE
United States
Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

GEORGE RUMEH,

Appellee,

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

BERTHA LUCILLE RHODES,

Appellee.

Appellant's Opening Brief

Upon Appeal from the District Court of the United States
for the District of Arizona.

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ALEXANDER B. BAKER
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Phoenix, Arizona

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IN THE
United States
Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

GEORGE RUMEH,

Appellee,

PACIFIC GREYHOUND LINES, a corporation,
Appellant,

vs.

BERTHA LUCILLE RHODES,

Appellee.

Appellant's Opening Brief

Upon Appeal from the District Court of the United States
for the District of Arizona.

In this brief the parties will be referred to by their designations in the District Court, viz.: Appellant as plaintiff, and Appellees as defendants. All figures in parentheses refer to pages of the printed Transcript of Record unless otherwise expressly identified.

I.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Arizona over the parties and subject matter in each of above cases was invoked under Paragraph (1), Section 41, Title 28, United States Code, because: (a) the respective suit is between citizens of different states, plaintiff in each case being a citizen and resident of the State of Arizona, and the defendant in each case being a corporation and citizen and resident of the State of California; and (b) the value of the matter in controversy in each case exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

Jurisdiction is conferred upon this court to entertain and decide the case upon these appeals by Sections 1291 and 1294, Title 28 (New) United States Code, in that a verdict of the jury for the sum of Twenty-one Thousand Dollars in favor of the plaintiff, George Rumeh, was returned in the case of *George Rumeh v. Pacific Greyhound Lines* (No. Civ. 67—Globe, U. S. District Court) on November 4, 1948 (60); and on the same date the jury returned a verdict for the sum of Eleven Thousand Dollars in favor of the plaintiff, Bertha Lucille Rhodes, in the case of *Bertha Lucille Rhodes v. Pacific Greyhound Lines* (No. Civ. 426—Tucson, U. S. District Court) (60). On November 4, 1948, judgment was entered in the *Rumeh* case, No. 67, in favor of the plaintiff and against the defendant in the sum of Twenty-one Thousand Dollars in accordance with the verdict (2); and on the same date judgment was entered in the *Rhodes* case, No. 426, in favor of the plaintiff and against the defendant in the

sum of Eleven Thousand Dollars in accordance with verdict (2, 4).

Thereafter, and within the time allowed by law, defendant in each case, Rumeh, No. 67, and Rhodes, No. 426, filed its motion for judgment for defendant notwithstanding the verdict and for judgment in accordance with motion for directed verdict, and alternative motion for new trial (28-34). Upon stipulation such motions were submitted upon briefs and it was further stipulated that the court could render its orders from the State of California (34-35).

On March 7, 1949, the court entered its orders denying motions for judgment notwithstanding verdict and for new trial in each case (35-41). On March 31, 1949, defendant filed Notice of Appeal in each case to this United States Court of Appeals for the Ninth Circuit (46-47), together with a Supersedeas and Cost Bond, duly approved by the court (41-46). The cases having been consolidated for trial, it was stipulated the records of the two cases should be consolidated for the purposes of appeal (49). Defendant filed Designation of Record and Proceedings to be Contained in Record on Appeal, together with Reporter's Transcript of the Evidence (48).

II.

STATEMENT OF THE CASE

Both of the above cases arose from the same accident. Each plaintiff was a passenger upon the same bus operated by the defendant and was injured as a result of the same accident. George Rumeh filed the first suit directly in the United States District Court for the District of

Arizona and it was assigned docket No. Civ. 67—Globe. The Complaint in the *Rumeh* case, after alleging the jurisdictional facts, and the fact that defendant was a common carrier of passengers for hire, states that on March 25, 1946, plaintiff Rumeh was a paid passenger on the bus of the defendant from Miami, Arizona, to El Paso, Texas; that the bus was operated and driven by one Cody Bach, an agent and employee of the defendant; that while said bus was traveling through the State of New Mexico, and was in the vicinity of Las Cruces, New Mexico, the defendant, by and through its agent Bach, negligently and carelessly operated the bus so as to cause it to collide with an approaching automobile, resulting in injuries to the plaintiff Rumeh consisting of an aggravation and reactivation of a pulmonary tubercular condition previously existing, a fracture of the right shoulder, shock and other injuries. Rumeh prays recovery in the sum of \$95,000.00 (4-8).

Defendant, in its Answer to the *Rumeh* Complaint, denies all the material allegations, including all charges of negligence, injuries and damages, and sets up as an affirmative defense the fact that at the time and place of the accident the driver of defendant's bus was met with a sudden and immediate emergency, not caused by his own act, and was suddenly and abruptly confronted with imminent peril, and said driver used and exercised his best judgment and efforts under the circumstances to avoid a collision with an approaching vehicle (8-13).

The *Rhodes* case was originally filed in the Superior Court of Pima County, Arizona (13), and was thereafter removed to the United States District Court for the District of Arizona where it was assigned docket No. Civ.

426—Tucson (3, 16-17). Removal was effected in June, 1947, before the effective date of the new acts changing method of removal. The Complaint in the *Rhodes* case sets forth the same accident named in the *Rumeh* case, and alleges that plaintiff Rhodes was a paid passenger on the bus from Safford, Arizona, to Clovis, New Mexico, and alleges that as a result of the collision between the bus and approaching vehicle two of plaintiff's teeth were knocked out, her back and spine were injured and she was otherwise bruised and shaken, and also alleged loss of luggage (13-15). Plaintiff Rhodes originally prayed recovery in the sum of \$10,050.00, but trial amendment of Complaint was permitted increasing prayer for recovery to the sum of \$25,050.00 (280). The answer in the *Rhodes* case is substantially the same as in the *Rumeh* case (18-20). Upon motion the cases were consolidated for trial (2, 3, 21).

As will appear from the specifications of error the main points relied upon by appellant in this appeal are: First, no act upon the part of the defendant's driver was the proximate cause of the accident and injuries in question, but such were caused by the act of a third person not under the control of the defendant; second, the driver of the bus was met with a sudden and immediate emergency and the accident was unavoidable; third, the damages awarded by the jury are excessive. It is apparent that the argument of such points will require a review of the evidence and an extended statement of the testimony in this Statement of the Case will only be unnecessary repetition.

We think it sufficient at this time to briefly review facts that are not subject to dispute. The accident occurred on March 25, 1946; the plaintiffs were passengers in a bus owned and operated by defendant; the bus was being driven by Cody Bach, an agent of the defendant; he took charge of the bus at Safford, Arizona, and was destined to El Paso, Texas (266). While the bus was traversing a straight highway in the vicinity of Las Cruces, New Mexico (about ten miles from Las Cruces), while it was still broad daylight a Ford automobile approached the bus from the opposite direction—the bus traveling east and the Ford west, there was no obstruction of view (268-269). There was a collision between the bus and the Ford resulting in the injuries complained of.

Pertinent undisputed facts: The highway was paved, the pavement being twenty-one feet in width, and there being dirt and gravel shoulders six feet in width on each side of pavement (147). The bus weighed 18,000 pounds unladen and the Ford about 3,100 pounds (146-147). The collision occurred “right at the south edge of the pavement” (142), *that is at the extreme right side of road looking east—the direction of the bus*. The only skid marks observed by Captain C. J. Salas of the New Mexico State Police who investigated the accident was that made by the bus as it left the pavement at the south of the road—that mark was about 5 feet long (142). The driver of the Ford apparently never applied a brake (145). There was physical evidence on the highway of the point of impact between the Ford and bus—it was at the south edge of the pavement (143). The impact knocked out all the brakes of the bus and it rolled free about 144 feet

along the south side of the pavement after the impact (146). *It is admitted by all of plaintiffs' witnesses that the bus was traveling well on its right side of the road—the south side—and that the Ford swerved and turned from its right side to its left side of the road—that is from the north to the south—and headed straight for the bus.* It is inescapable that the real and dominant cause of the accident was a Ford car turning to the wrong side of the road in front of the bus. We appreciate that plaintiffs contended in the court below and undoubtedly will contend here that the evidence was sufficient to show excessive speed on the part of the bus which prevented the driver from stopping in time to avoid collision, *but it is absolutely certain that if the Ford had not swerved and turned in front of the bus there would have been no accident.*

Defendant, at the close of plaintiffs' testimony, and again at the close of all testimony for plaintiffs and defendant, moved the court to direct a verdict in favor of the defendant upon the following grounds:

“One, there is no evidence adduced by the plaintiffs showing any negligent act on the part of the defendant.

Two, there is no evidence adduced by the plaintiffs showing that there was any excessive rate of speed.

Three, that it affirmatively appears from the testimony that any act upon the part of the defendant, whether negligent or not, was not the proximate cause of the accident and injuries in question.

Four, upon the further ground that it affirmatively appears from the plaintiffs' testimony that the sole and proximate cause of the accident and injuries in question was not any negligent act upon the part of

the defendant, but was by reason of the acts of a third person not under the control of the defendant.

Five, on the ground that the plaintiffs have not carried the burden of proof required of it in that they have not shown by a preponderance of the evidence that the defendant was negligent in any respect pleaded in the complaints, and they have not shown by a preponderance of the evidence that any act upon the part of the defendant was the proximate cause of the accident and the injuries in question." (233, 234, 279).

Both motions were denied, and the jury returned verdicts in favor of plaintiffs Rume and Rhodes in the sums of \$21,000.00 and \$11,000.00, respectively.

III.

SPECIFICATIONS OF ERROR

No. 1. The Court erred in denying defendant's motion for a directed verdict in each case (233, 234, 279), and in denying defendant's motion for judgment for the defendant notwithstanding the verdict and for judgment in accordance with motion for directed verdict in each case (28, 31) (orders denying motions 35-41) made pursuant to Rule 50 of the Rules of Civil Procedure for the District Courts of the United States, upon the following grounds:

(a) The evidence is insufficient to sustain any cause of action or legal claim for relief in favor of the plaintiffs, and is insufficient to support the verdict or judgment in either case, and the verdicts and judgments are not justified by the evidence and are contrary to the evidence and the law.

(b) There is no substantial evidence establishing an act on the part of the defendant which constituted actionable negligence, and the evidence is not sufficient to establish a causal relation or connection between any alleged negligent act of the defendant and the accident or injuries to plaintiffs.

(c) The evidence is insufficient to establish that an alleged negligent act of the defendant was the proximate cause of the accident and injuries, and, on the contrary, it affirmatively and conclusively appears from the evidence that the negligent act of a third person, not under the control of the defendant, produced the accident and injuries and was the proximate cause of the same, and without such negligent act of a third person the accident would not have occurred.

(d) That it affirmatively and conclusively appears from the evidence that the driver of defendant's bus at the time and place of the accident was confronted with a sudden emergency, not caused by his own act, and he exercised his best judgment and efforts under the circumstances, and the accident was unavoidable.

No. 2. The Court erred in denying defendant's alternative motion for new trial made in each case (29, 32) (orders denying motions 35-41) upon the ground that the amount of damages awarded plaintiff in each case by the jury was grossly excessive and not justified by the evidence.

No. 3. The Court erred in denying defendant's alternative motion for new trial made in each case upon the ground that it appears from the evidence and the excessive verdicts and the odd amount found in favor of each plaintiff that the jury was swayed and influenced by pas-

sion or prejudice in arriving at the verdicts, and did not base the same on fact or law.

No. 4. The Court erred in denying defendant's alternative motion for new trial made in each case upon the grounds and for the reasons set forth in Specification of Error No. 1, and paragraphs a, b, c and d thereof.

IV.

ARGUMENT

- I. PLAINTIFFS FAILED TO ESTABLISH ANY ACT UPON THE PART OF THE DEFENDANT SUFFICIENT TO CONSTITUTE ACTIONABLE NEGLIGENCE. (Specification of Error No. 1, paragraphs a-b.)

It is conceded, of course, that the defendant was a common carrier of passengers and the plaintiffs were paid passengers upon one of its buses, and we are quite aware of the rule that the defendant was bound to exercise as high a degree of care, skill and diligence in conveying the plaintiffs to their destinations as the means of conveyance employed and the circumstances of the case permitted.

Volume 4, *Blashfield's Cyclopedia Auto Law*, Part 1, Section 2151, pages 52 et seq.

But it is also the rule that "the carrier is not the insurer of the safety of passengers, and under the law the passenger assumes the ordinary and usual danger and perils of such trips."

Alexander v. Pacific Greyhound Lines, 65 Ariz. 187, 177 Pac.2d 229, r.p. 193 Ariz. Rept.

The plaintiffs contended that the defendant was negligent in only one respect and that is that the driver of the bus, Cody Bach, was violating the speed law of the State

of New Mexico, and that caused or contributed to the accident in some manner or form. There is no evidence whatever of any other negligence on the part of Bach or the defendant. The bus was in good condition, the brakes in good working order, it was broad daylight on a straight road, he was operating the bus well on his right-hand side of the road and was a competent, experienced driver.

The burden of proof was, of course, upon the plaintiffs to establish by a preponderance of the evidence that the defendant was negligent and such negligence was the proximate cause of the accident and injuries. It was conceded by all of plaintiffs' witnesses that Bach was operating the bus along the highway in the State of New Mexico, near the City of Las Cruces, in an easterly direction along his right-hand side of the road, that is the south side of the highway, at about 6:00 or 6:10 P.M., on March 25, 1946. It was admitted by all of plaintiffs' witnesses that a Ford automobile was approaching the bus from the east, and that the Ford turned from its right side of the road—the north side—to the left onto the south side in front of the bus and a collision resulted which was the cause of plaintiffs' injuries.

The law of New Mexico, at the time and place of the collision, prescribed a speed limit of 45 miles per hour for automobiles, including buses (147). The plaintiffs contend that the bus was exceeding the legal speed limit. They introduced no proof of the speed at which the bus was traveling. The plaintiffs had only three witnesses who saw the accident and had personal knowledge of the same. They were the two plaintiffs and a Mrs. Viola B. Tuck. Plaintiff George Rumeh testified that before and at the time of the accident he was lying down resting and did

not know how fast the bus was going. Apparently, the speed of the bus did not annoy or disturb him (196). The plaintiff, Bertha Lucille Rhodes, testified she was sitting with her little boy and had no idea of the speed of the bus and did not know there was an impending accident until she was thrown in the aisle. Evidently she sensed no unusual speed (180-183). The witness Viola B. Tuck testified:

“Q. You say before the time of the accident you were reading and not paying attention to the road and surrounding circumstances?

A. I have made the trip so many times I was perfectly relaxed.

Q. You were perfectly relaxed?

A. Yes, sir.

Q. There was nothing in the operation of the bus that caused you any fear, anxiety or anything of that sort, was there?

A. No, sir.

Q. No unusual operation of any kind, is that right?

A. No, the road dipped and I was used to that.”
(114-115)

We doubt if there is evidence sufficient to show that defendant's bus was exceeding the 45-mile speed limit. To gain such a fact you will have to engage in strained and far-fetched inferences from the testimony of a traffic expert, Lt. Howard Jones of the El Paso Police Department, computing distances at which an automobile can be stopped when operating at certain rates of speed, or from a statement made by the driver, Bach, to a Captain Salas of the New Mexico State Police, to the effect that he was traveling at his “usual” rate of speed. Assuming, however, that you can reasonably infer that the bus was

operating at a speed greater than 45 miles an hour, it must be admitted that it was not traveling at an excessive or unusual rate of speed because no passenger witnesses sensed or experienced any uneasiness or apprehension.

It is true to determine whether the bus driver was violating a statute and to determine what standard of care should be applied to the defendant we must look to the law of the State of New Mexico, as such was the place of the accident. But the plaintiffs elected at their own volition to bring their actions in the State of Arizona and therefore the application of the standard of care prescribed within the State of New Mexico will be made in accordance with the rules of evidence, inferences and presumptions prescribed by the State of Arizona, the law of the forum.

Sections 380, 595, *Restatement of Conflict of Laws*.

There is some confusion among the various states as to what presumption or inference arises from a violation of a law by the operator of a motor vehicle. In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, the Supreme Court of the United States stated:

“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern.”

And the Court further held that there is no federal general common law, and the federal courts have no power to make law for the states. Therefore, we assume that this

court will follow the decisions of the Supreme Court of the State of Arizona.

Some courts hold that a presumption of negligence arises from a violation of a statute and the same constitutes negligence *per se*. That is not true in Arizona, however, particularly in respect to violation of speed statutes. Our Supreme Court has repeatedly held that driving at a speed in excess of that provided by statute is not negligence *per se* and such constitutes actionable negligence only when the plaintiff goes further and establishes that the speed violation was the proximate cause of the injuries.

“Driving at an excessive rate of speed, however, must have been the cause of the accident before it can do more than establish a *prima facie* case against the defendants, for merely driving on the wrong side of the road or at a rate of speed in excess of that provided by statute is not negligent *per se*, but will sustain a verdict only when it is shown that it was the proximate cause of the injury.”

McIver v. Allen, 33 Ariz. 28, r. p. 36; 262 Pac. 5.

“Plaintiff’s negligence under the findings of the trial court consisted *first* in driving his truck at a speed in excess of that specified in the statute, namely, a speed of about 35 miles per hour. Our code section regulating the speed of motor vehicles is 66-103, A.C.A. 1939, which provides that ‘It shall be unlawful for the driver of a motor truck towing a trailer or semi-trailer to drive the same at a speed in excess of twenty (20) miles per hour upon any public highway.’ A violation of this statute (Rep. Ch. 11, S. L. 1945) is not negligence *per se*. It is the law of this jurisdiction that driving in excess of the speed limit does not in and of itself constitute negligence

per se. *McIver v. Allen*, 33 Ariz. 28, 262 P. 5. *Exceeding the speed limit is not negligence as a matter of law but may be as a matter of fact if it proximately causes or contributes to an accident.*'' (Emphasis ours.)

Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, r. p. 113; 166 Pac.2d 816.

There was no causal relation or connection between the bus exceeding the New Mexico speed limit, if such is true, and plaintiffs' injuries. If the Ford car had not left its right side of the road and proceeded to its wrong side of the road in front of the bus, there would have been no accident or injuries no matter at what rate of speed the bus was operating. On the other hand, there is no showing whatever that if the bus had been operating within the 45-mile speed limit of New Mexico the accident could have been avoided. Insofar as the testimony is concerned, the accident would have happened if the bus had been traveling at the rate of only 40 miles per hour. Therefore, there was no causal relation between the speed of the bus and the accident, and under the decisions of the Supreme Court of the State of Arizona there was no actionable negligence on the part of the defendant, and the motions for instructed verdicts in favor of the defendant should have been granted.

II. THE EFFICIENT AND PROXIMATE CAUSE OF PLAINTIFFS' INJURIES WAS THE NEGLIGENT ACT OF A THIRD PERSON AND NOT AN ACT OF THE DEFENDANT.
(Specification of Error No. 1, paragraphs a, c.)

The proximate cause of an injury is the primary or moving cause and without which the accident could not

have happened. It is the efficient cause, the one that necessarily sets the other causes in operation.

Salt River Valley Water Users' Assn. v. Cornum,
49 Ariz. 1, 63 Pac.(2d) 639;

Insurance Co. v. Boon, 95 U.S. 117, 24 L.Ed. 395.

Assuming that Cody Bach, the driver of defendant's bus, was driving at more than 45 miles an hour (New Mexico speed limit), yet the speed of the bus was not the cause of the accident and injuries. *The sole and proximate cause was a Ford automobile leaving its side of the road and running into the bus.*

The plaintiffs' witnesses, in describing the accident and the cause thereof, testified substantially as follows: Plaintiff George Rumeh testified that he was in a front seat of the bus, to the right of the driver, and had an unobstructed view (195-196). He was lying down and was awakened when the driver "slammed" on his brakes. The driver "held them down" and Rumeh looked up and saw the Ford car "almost right at us" (196). When he looked up the Ford was "right on him" (204). It is important to note that Rumeh testified that he was aroused by the application of the brakes, *and the driver kept the brakes applied from the time of the first application until collision.* "After I saw he wasn't letting them up, I looked up and saw the Ford right on top of us" (204). Rumeh was thrown from the bus by the collision and therefore has no distinct recollection of the collision itself. The plaintiff Mrs. Rhodes did not see the collision. All that she knows is that she was riding in the bus, seated with her boy, and suddenly found herself in the aisle (191). She must have been thrown by the application of the

brakes or the collision. The testimony of Rumeh and Mrs. Rhodes confirms the fact that the application of the brakes and the collision was very close together—almost momentary.

Plaintiffs' witness Viola B. Tuck claimed to see and know a lot more than Rumeh or Mrs. Rhodes. Mrs. Tuck sued the Greyhound Lines for damages resulting from the same accident. She testified that she was sitting in the third row of seats, behind the driver (101), and she was not conscious of any change of speed in the bus "until the brakes were applied and I was thrown forward breaking my teeth and knocking them out" (102-103). She looked up after she was thrown forward and saw the Ford approaching the bus "on the bus' side of the road" (103), it was just far enough away so she could see the entire Ford car. She identified the distance between the bus and the Ford when she first saw it as being the length of the court room (104). The length of the court room was established at 65 feet (166). When she looked up the driver of the bus was pulling to his right and continued pulling to his right until the time of the impact (117). "As I first glanced up the car was coming straight towards the bus and at the same instant turned sharp left, *and by that time they were together*" (111). She kept her eye on the Ford from the time she first saw it and it was coming "head on", and it was only a fraction of a minute before the collision occurred (116). From Mrs. Tuck's testimony it would appear that the bus was traveling on its right of the road, at a rate of speed that allowed her to relax, then there was an application of brakes of sufficient force to throw her forward and knock out her teeth; she then looked up and at that instant the bus was pulling to its

right and the Ford car was at a distance of about 65 feet heading directly for the bus, and then the Ford "turned sharply to the left" (117). The collision occurred immediately thereafter—"by that time they were together" (111). Under such circumstances, how can it be contended that the bus driver could have avoided the collision?

Lt. Howard Jones was called by the plaintiffs as an expert. He is a Traffic Engineer and Safety Director in the El Paso Police Department. He testified as to braking efficiency of automobiles and the distances within which they could be stopped. He recited a formula from which you can determine the speed of a vehicle from the length of the skid marks left on the road after the application of the brakes. He testified you can stop a vehicle traveling at 20 miles per hour within 20 feet *after the brakes take effect*. But if the vehicle was traveling at the rate of 40 miles an hour it would take 80 feet to stop it after the brakes grip, and if traveling 60 miles it would require 180 feet (159-160). *Estimates of speed are based solely upon the skid marks left on the road* (223). That is, an expert can base his judgment only on the marks left on the road by a full application of the brakes. It takes a driver about $\frac{3}{4}$ of a second to apply his brakes, that is, if he is met with an emergency it will be about $\frac{3}{4}$ of a second before the brakes take effect (227). If a car is proceeding at a rate of 50 miles an hour it travels about 70 feet per second. That is arrived at by multiplying the number of feet in a mile by the rate per hour and dividing by the number of second in an hour (226). If a man traveling at the rate of 50 miles per hour meets an emergency and starts to apply the brakes, the car will travel about 51 feet before the brakes take effect (227). If a bus is traveling at the

rate of 45 miles per hour it would take 101.2 feet to stop it after brakes take effect, if it is traveling 50 miles an hour it will take 130 feet (216-217).

Captain C. J. Salas, a witness for the plaintiffs, stated that he was with the New Mexico State Police and investigated the accident in question. He arrived at the scene of the accident at 6:25 P.M., which was about 15 minutes after the time of the accident (128). His testimony clearly establishes where the collision occurred, and skid marks left by the vehicles. He identified the photographs in evidence, being Plaintiffs' Exhibit 5, and Defendant's Exhibits A, B, C and D. He identified the point of impact with a blue penciled "X" on Defendant's Exhibit B (143), the impact occurred right at the south edge of the pavement (131). The Ford appeared to have been entirely off the pavement and on the south dirt shoulder when the impact occurred, and the front wheels of the bus were off the pavement (131-132). The left rear wheels of the bus were on the pavement and were about 4 feet from the edge of the pavement (132). When the collision occurred the bus was at an angle headed to the southeast. The bus came to rest about 144 feet from point of impact and was in the borrow pit on the south side of the road parallel with the pavement (132-133). He examined the road for the purpose of identifying skid marks and other evidence of the accident and went back up the road a distance from the point of impact. He found no skid marks whatever except that appearing in the photographs (229-230). There was no indication on the highway that the driver of the Ford car ever applied his brakes or attempted to stop (145). The force of the collision knocked out the brakes on the bus (146). The only skid mark on the road was that left by

the bus on the pavement at point of impact, and that skid mark was about 5 feet long (142).

The only disinterested eye witness to the accident was William Boone, a witness for the defendant. All plaintiffs' witnesses (other than experts) were parties to the suit, or Mrs. Tuck who was seeking to recover damages from the defendant. Boone testified that he was sitting on the right-hand side of the bus about the middle thereof (243), and he saw the Ford car approaching and it was then on its right-hand side of the road very close to the north edge of the pavement. At that time it was about 180 feet distance from the bus (244). It was traveling at a rate of between 45 and 55 miles per hour (245). A puff of dust called his attention to the Ford, which may have been caused by a blowout or the right wheel picking up dust from the shoulder (244). The Ford pulled back towards the center of the road and then came across in front of the bus (245). The Ford never stopped or reduced its speed (245-246). When the Ford turned to its left the driver of the bus attempted to turn to his right and applied his brakes (248). You could hardly judge any space of time between the time the Ford swerved to the left and the collision—it was momentary (249).

The driver of the bus, Cody Bach, testified that he usually travels about 50 miles an hour, but before he met this Ford automobile he passed a trailer so he slowed up and shifted into third gear, which reduced his speed to 30 or 40 miles per hour (267-268). He passed this trailer and then observed the Ford which was about one-half mile away, and he had not picked up his speed to 50 miles by the time he reached the Ford (268). The Ford was well on its right-hand side of the road—north side—and there

was nothing in its operation to indicate impending danger (268-269). When the Ford was about 40 or 50 feet from the bus, it suddenly swerved to its left in front of the bus (269). When Bach saw the Ford swerve to the left he pulled the bus sharply to the right, trying to avoid a collision, and applied his brakes (270-271). The collision occurred momentarily thereafter (271). When the collision occurred the front wheels of the bus were off the pavement on the south side of the road (271).

We believe we have fairly stated the testimony showing the accident and incidents immediately preceding the same. The bus driver could not have avoided the collision whether he had been going 30, 40, 50, 60 or 70 miles an hour. The sole and only cause of the accident was the fact that a Ford car suddenly left its line of travel and turned in front of the bus. A like situation arose in Arizona resulting in the case of *Alexander v. Pacific Greyhound Lines*, 65 Ariz. 187, 177 Pac.2d 229. In that case the plaintiff was a paid passenger upon a bus of the defendant. There was evidence that the driver of the bus was exceeding the speed limit prescribed by the laws of the State of Arizona, and the Supreme Court, in its decision, admitted that there was sufficient evidence to show speed in excess of the legal limits. In the *Alexander* case, as in this case, an approaching vehicle turned from its line of travel into the line of travel occupied by the bus, and there was a collision and the passenger, Sue Alexander, brought suit. At the close of plaintiff's testimony defendant moved for an instructed verdict upon the ground that the proximate cause of the accident was the negligence of a third person, and not the speed or negligence of the driver of the bus. The lower court granted

the motion, judgment was entered for the defendant, plaintiff appealed, and the judgment of the trial court was affirmed, upon the ground that the proximate cause of the accident was the act of a third person and not the negligent act of the defendant. In the *Alexander* case our Supreme Court stated:

“The following comments are pertinent to the instant case: There was no proof that the driver of the bus was at any time off his side of the road. Had it not been for the Essex car suddenly leaving its side of the road the accident would not have occurred. The injury to the plaintiff occurred after the bus left the highway and was caused by a palo verde tree struck by the bus. The accident occurred where the highway was straight, meaning without curves. The carrier is not the insurer of the safety of passengers, and under the law the passenger assumes the ordinary and usual dangers and perils of such trips. The testimony as to the rate of speed the bus was traveling was conflicting, but driving at an unlawful rate of speed is not negligence per se; *Alabam Freight Lines v. Phoenix Bakery, Inc.*, 64 Ariz. 101, 166 P.2d 816, but will sustain a verdict only when it is shown that exceeding the speed limit was the proximate cause of the injury.

Alexander v. Pacific Greyhound Lines, 65 Ariz. 187, r. p. 193; 177 Pac.2d 229.

The facts of the case at bar cannot be distinguished from the *Alexander* case. In both cases there was evidence showing speed in excess of a statutory limit. In both cases an approaching vehicle turned from its line of travel to the left side of the road. In both cases it appears that the accident would not have occurred but for the negli-

gence of a third person. In both cases the bus was rendered out of control by reason of the collision. The facts of the *Alexander* case are stronger against the defendant than the present case, for the reason that in the *Alexander* case the bus traveled 400 feet across the desert after the collision before it was brought under control, and, in the meantime, struck a palo verde tree.

All of the facts point to only one conclusion, and that is, the efficient cause of the accident in question was a negligent act of a third person not under control of the defendant. Plaintiffs introduced expert traffic evidence, but we defy counsel to use the formula introduced by their expert and figure any way that this bus driver could have avoided collision. The court should have granted defendant's motion for instructed verdict, or should have granted the motion for judgment notwithstanding the verdict.

III. THE ACCIDENT WAS UNAVOIDABLE AS DEFENDANT WAS CONFRONTED WITH A SUDDEN EMERGENCY AND EXERCISED ITS BEST JUDGMENT UNDER THE CIRCUMSTANCES. (Specification of Error No. 1, paragraphs a, d.)

There is no dispute but what the driver in this case was confronted with an unexpected crisis. He was operating his bus upon his right side of the road and was entitled to rely upon approaching vehicles staying on their side of the road. A Ford car approached the bus from the opposite direction, and to all appearances intended to keep to the right. The Ford turned out of its course into the line of travel pursued by the bus. This confronted Bach, the bus driver, with an unexpected condition not brought on by his act. He exercised his best judgment under the circumstances and attempted to pull to his right to go

around the Ford, and also applied his brakes. That would be the reaction of any human being.

It is possible that some person, after deliberation, could conceive of some way of avoiding the accident, but this bus driver, when confronted with an unexpected crisis, was not called upon to exercise the same ordered judgment as a person who has time to consider the situation.

Volume 4, *Blashfield's Cyclopedia Auto Law*, Part 1, Section 2163, page 113.

“Failure to think when there is time for *instinctive action only* is not negligence.” (Emphasis ours.)

Maiwald v. Public Service of New Hampshire, 41 A.2d 247, 93 N.H. 276.

We contend that plaintiffs' own testimony showed that bus driver, Bach, was confronted with an unexpected crisis, and he exercised the same judgment and efforts that any other person would exercise under the same circumstances. That being true, there was no negligence upon his part.

IV. THE AMOUNTS AWARDED PLAINTIFFS WERE EXCESSIVE AND THE VERDICTS WERE RENDERED UNDER INFLUENCE OF PASSION OR PREJUDICE. (Specifications of Error Nos. 2 and 3.)

We have the unusual situation of a jury rendering verdicts in the sums of \$21,000.00 and \$11,000.00 for the plaintiffs Rumeh and Rhodes, respectively. The odd amount of the verdicts immediately casts suspicion upon the authenticity of the same. There is no apparent reason from the facts why one verdict should be \$21,000.00 instead of \$20,000.00, and the other \$11,000.00 instead of \$10,000.00. They have all the earmarks of being quotient verdicts.

The verdicts are grossly excessive. The plaintiff Rumch suffered only one fracture and that was of his shoulder, which was more or less inconsequential. His main claim for damages is the alleged fact that tuberculosis had been reactivated. He had suffered with tuberculosis for some years before the accident (198). We need consider only his right lung as his physician, Dr. A. D. Long, appeared to give significance only to the condition of that lung. He examined Rumch on May 24, 1946 about two months after the accident (82-83) and stated:

“Well, I found what is evidently an old tuberculosis lesion in the right lung and I found some—that there was some fluid in there, evidently of recent development, and I also found that the right shoulder, arm bone was broken in the shoulder joint.” (83)

Dr. Long stated that the X-ray indicated that Rumch had lesion in his right lung before the time of the accident, which restricted the air space in the lung, but claims the air space had been further restricted by reason of the accident (94). The man had tuberculosis before the time of the accident, and as to whether the accident aggravated it is conjectural and merely a matter of opinion. Before the accident he and his mother owned a grocery store (213), and after the accident they sold it for the sum of \$6,000.00 (212). There is no showing that he has lost any earnings by reason of the accident. The only evidence is that he and his mother owned a grocery store and then sold it. When the accident occurred he was 39 years old. Such circumstances cannot possibly justify a verdict in the sum of \$21,000.00.

Mrs. Rhodes was a housewife with no earning capacity. She was about 43 years old at the time of the accident.

The accident occurred on March 25, 1946, and the first medical attention she had was a year later, spring of 1947, when she called upon Dr. Delbert L. Secrist (178, 186). At that time, a year after the accident, X-rays were taken which showed that she had spondylolisthesis, which in plain English means that one vertebra of her spine had slipped from its regular position (173-175, 178-179). While her physicians, Dr. Secrist and Dr. N. K. Thomas, were of the opinion that the condition of her spine was due to accident, they could not identify when the accident occurred. All they could say was that the injury had taken place at some time before they examined her, and that examination was made a year after the accident in question in this case. While this spinal condition caused discomfort, the evidence does not indicate that it caused any disability. She had no earning capacity.

A citation of authorities on excessive damages would be useless as each case must stand on its own footing. The amount of damages that may properly be awarded in any particular case depends upon the facts and circumstances of that case, but the amount awarded must not exceed a fair compensation for the injuries inflicted. In this case the jury were not permitted to impose punitive or exemplary damages, nor were they permitted to assess damages by reason of compassion or sympathy. We earnestly insist that the damages awarded by the jury in these cases were grossly excessive and greatly exceeded any compensation to which the plaintiffs were rightfully entitled.

We do not think that the jury gave consideration to the facts of the case, and did not base the verdicts upon fact, but were guided by passion or prejudice or by sympathy and compassion.

V. THE COURT SHOULD HAVE GRANTED DEFENDANT'S
ALTERNATIVE MOTIONS FOR NEW TRIAL. (Specification
of Error No. 4.)

Defendant's alternative motions for new trial set forth all the grounds contained in Specification of Error No. 1, in paragraphs a, b, c and d thereof. We therefore refer to paragraphs I, II and III of this Argument in support of our contention that at least a new trial should have been granted.

Respectfully submitted,

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In the
United States
Court of Appeals
For the Ninth Circuit

PACIFIC GREYHOUND LINES, a
corporation,

Appellant,

vs.

GEORGE RUMEH,

Appellee.

PACIFIC GREYHOUND LINES, a
corporation,

Appellant,

vs.

BERTHA LUCILLE RHODES,

Appellee.

Upon Appeal from the District Court of the United
States for the District of Arizona.

APPELLEES' ANSWERING BRIEF

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AUG 16 1949

PAUL P. O'BRIEN,
CLERK

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vs.

BERTHA LUCILLE RHODES,

Appellee.

No. 12237

Upon Appeal from the District Court of the United
States for the District of Arizona.

APPELLEES' ANSWERING BRIEF

In this brief, as in the opening brief heretofore filed by appellant, the appellees will refer to the parties to this appeal by their designations in the District Court of the United States for the District of Arizona, viz., appellant as defendant and appellees as plaintiffs.

All figures in parenthesis refer to pages of the transcript of record, unless otherwise expressly identified.

I.

JURISDICTIONAL STATEMENT

The appellees concur in the jurisdictional statement as set forth on pp. 2 and 3 of the appellant's opening brief.

II.

STATEMENT OF CASE

The appellees concur with the statement of the case as set forth in appellant's opening brief down to the sentence on page 6 of the appellant's opening brief reading as following:

“The driver of the Ford apparently never applied a brake (145)”.

We are unable to concur with this statement nor with the appellant's conclusions as to the remaining so-called pertinent undisputed facts.

As to whether or not the driver of the Ford automobile involved in the collision which is the basis of this case ever applied his brakes, we believe that question was succinctly answered by Captain Salas in his testimony as follows (145):

Q. (By Mr. Baker): "From your experience as a highway patrolman, would you say that Ford car ever applied its brakes or ever made an attempt to stop?"

A. "I cannot say as to that; *that is one thing we will never know.*" (Emphasis supplied.)

Plaintiffs do agree that there was physical evidence on the highway showing the point of impact between the Ford and bus; that such point of impact was at the south edge of the pavement, and that it was a distance of 144 feet from the point of impact to the front end of the bus at the point where the bus finally came to a stop; and in view of the testimony of the driver of the bus, Cody Bach (272), that he was thrown from the bus at the time of impact, we can concede that there was in all probability no application of the brakes after the time of impact. However, to say that the bus "rolled free" for a distance of 144 feet when it was pushing a 3000-lb. Ford automobile in front of it for that distance and crushing the automobile under it in the process seems to plaintiffs as too great an exaggeration to be worthy of consideration.

Defendant omitted from the pertinent undisputed facts the testimony of Viola B. Tuck (108) that there were dual wheel skid marks on the pavement about "a city block" prior to the point of impact. She also testified that there was physical evidence on the highway at the point of impact. The distance of a "city block" as used by Mrs. Tuck in her testimony was later determined to be about 260 feet (121). This testi-

mony of Mrs. Tuck fits in closely with the statement made by the driver of the bus, Cody Bach, to Captain C. J. Salas shortly after the collision (139) that he had observed the oncoming car at a distance of approximately 300 feet. It may be readily inferred that the natural act of the driver at that time would be to apply the brakes of his bus. This inference is strengthened by the further testimony of Mrs. Viola B. Tuck (102) that a violent application of the brakes on the bus prior to the impact of the bus with the automobile threw her against the seat in front of her and broke her teeth. This very definitely shows that the bus driver did see the oncoming car acting in an unusual manner at a distance of at least 260 feet before the point of impact, when the other car, approaching at a "fast rate" (270), must have been more than 500 feet distant.

The testimony of Lt. Howard Jones was undisputed, and according to the formula testified to by Lt. Jones (160), had the bus been travelling at a speed of 70 miles per hour it could have been stopped within a distance of 245 feet—an ample distance to have completely avoided the collision; and it requires no stretch of the imagination to realize that had the bus been hit by the Ford automobile when the bus was at a standstill, the plaintiffs would not have suffered the injuries of which they complain.

Plaintiffs agree that there is no evidence but that the bus was at all times travelling on the right side of the center line of the road. From the testimony of the

defendant's witness, William M. Boone (253), it would appear that the Ford car came toward the bus "on a long arc", and not at any sharp angle as suggested by counsel for defendant.

The pertinent undisputed facts then, the plaintiffs contend, indicate that the bus was travelling at such a terrific rate of speed that after the brakes were applied it travelled a distance of 260 feet, collided with the oncoming Ford car, which weighed approximately 3000 lbs., and then pushed that car a distance of 144 feet before coming to a stop off the paved highway.

Defendant's statement that plaintiffs will continue to contend the collision and their resulting injuries were caused by the greatly excessive speed of the bus is absolutely correct. However, the plaintiffs also contend that not only was the excessive and illegal speed of the bus a proximate and contributing cause of the collision and the injuries to the plaintiffs, but that the conduct of the driver of the bus in not properly attempting to bring the bus to a stop, when he saw danger approach from 300 to 500 feet ahead on the highway, was certainly a contributing and proximate cause of the collision and the plaintiffs' severe injuries.

Plaintiffs concur with the balance of the statement of the case as made by the defendant, from the sentence on page 7 of appellant's opening brief which reads as follows:

"Defendant at the close of plaintiff's testimony and again at the close of all testimony of

plaintiffs and defendant, moved the Court to direct a verdict in favor of the defendant on the following grounds:”

to the end of appellant’s statement of the case on page 8 of appellant’s opening brief.

III.

ARGUMENT

I. Plaintiffs Failed to Establish Any Act Upon the Part of the Defendant Sufficient to Constitute Actionable Negligence.

Under this heading the defendant contends that the plaintiffs failed to establish any act upon the part of the defendant sufficient to constitute actionable negligence. The defendant admits that it was bound to exercise as high a degree of care, skill and diligence in transporting the plaintiffs to their destinations as the means of conveyance employed and the circumstances of the case permitted. However, it is the contention of the defendant that there was not sufficient evidence introduced to warrant the jury in finding that the defendant was guilty of a breach of its duty to exercise this highest degree of care. In approaching the problem this court is to be guided by certain general rules of law, all of which tend to substantiate the verdict, viz.:

1. “In considering the motion for instructed verdict at the close of the whole case, it was the duty of the court to appraise the evidence at its

highest value in favor of the plaintiff. The effect of such motion was to admit the truth of all competent and relevant evidence introduced, tending to sustain plaintiffs' cause of action, whether offered by plaintiff or defendant." *Hines v. Gale*, 25 Ariz. 65, 213 Pac. 395, 397.

2. That a verdict will not be disturbed on appeal because it is against the weight of evidence. *Perazzo vs. Ortega*, 32 Ariz. 154, 256 Pac. 503.

3. And if the verdict is supported by any reasonable evidence, the verdict will not be disturbed because there is a conflict in the evidence. *Arizona Cotton Oil Co. vs. Thompson*, 30 Ariz. 204, 235 Pac. 673.

4. Where evidence is of such nature that either of two inferences may be drawn therefrom, the appellate court is bound by the inference chosen by the trial court or the trial jury. *Collins vs. Collins*, 46 Ariz. 485, 52 Pac. (2d) 1169, 1173; *Moeur vs. Farm Builders Corp.*, 35 Ariz. 130, 274 Pac. 1043; *Stewart vs. Schnepf*, 62 Ariz. 440, 444, 158 Pac. (2d) 529.

In citing cases to substantiate the above general rules of law, Arizona cases have been cited in the belief that:

"The quantum of evidence required to take the case to the jury and the right to direct a verdict for insufficiency of the evidence are also usually determined by the *lex fori*". (11 Am. Jr. 522).

However, the preceding four general rules are commonly accepted throughout the country and are well established in all of the appellate courts.

The defendant contends in its brief that the only possible way in which the defendant could have been negligent is in exceeding the speed laws of the State of New Mexico. The defendant seems to "doubt" (page 12 of appellant's brief) if there is evidence sufficient to show the defendant's bus was exceeding the 45 miles an hour speed limit, which is admitted was the governing speed statute in effect at the time and place of the accident. As a matter of fact, the evidence is almost conclusive and without contradiction that the defendant's driver *was* exceeding the speed limit of 45 miles an hour at the time he was confronted with the car coming at him on the wrong side of the road. The evidence of this, in part, is set forth in the following nine paragraphs.

(1) The defendant's bus schedule (plaintiff's Exhibit 4) shows that the defendant was maintaining a schedule calling for an average speed of 50 miles per hour.

(2) The testimony of Cody Bach, the driver of defendant's bus, is to the same effect. We quote from his testimony on direct examination (266) as follows:

"Q. Now, before the time of this accident, at what rate of speed were you traveling, Mr. Bach?

A. You mean before the accident occurred?

Q. Yes.

A. Well, our average speed is 50 miles per hour. Our schedule is set for that, this average speed.

Q. You estimate that is what your were traveling about 50 miles per hour?

A. Well, you would go that fast or sometimes faster, but that is an average speed."

(3) The uncontradicted testimony of Viola B. Tuck is that the bus was 8 minutes late leaving Deming and was on time at the point of the accident 50 miles from Deming (102). This would necessarily mean that the bus' *average* speed from Deming to the point of accident was *considerably* in excess of 50 miles per hour.

(4) The defense attorney attempted to lead the driver of the bus into saying that he had slowed down prior to the accident and had not yet picked up his full speed at the time of the accident. Unfortunately for the defendant, the bus driver, even when conducted along by leading questions, would not deny that he was travelling in excess of 45 miles per hour immediately prior to the accident. (268). The driver's testimony about slowing down prior to the accident is rather vague and must have lead the jury to reasonably conclude that he had picked up the "usual speed" immediately prior to the accident, which would be considerably in excess of 50 miles per hour.

(5) The plaintiffs also contend that the evidence very clearly shows that the driver of the bus had warning that a car was travelling toward him on the wrong side of the road at a time when the bus was still more than 260 feet from the point of impact, or more than 500 feet from the Ford car. (Evidence of this

will be discussed in the following section of the argument pertaining to proximate cause.) Besides being evidence of proximate cause, this evidence would establish either excessive speed, or negligent failure to apply brakes. The evidence of Lt. Howard Jones, who is qualified as an expert upon the braking capabilities of cars and busses, was that if the bus had been traveling 45 miles per hour the bus could have stopped in 101.2 feet (217) at the place of the accident, if its brakes were properly applied; that it could have stopped in 130 feet (217) had it been travelling 50 miles per hour, and, in 180 feet (226) if it had been travelling 60 miles per hour. If the bus driver received warning that a car was approaching him on the wrong side of the road, 260 feet prior to the point of impact, he should certainly have made every effort to reduce the speed of the bus. If the driver did not stop during this 260 feet, it would seem to necessarily follow that *either* he was going too fast to stop, or that he did not properly apply his brakes. From either of these facts the jury would be justified in finding the defendant negligent.

(6) It is the plaintiffs' belief, after listening to all of the evidence, that when the driver first applied his brakes 260 feet from the point of impact he was going so fast that the application of the brakes tended to throw the bus out of control and angled the bus toward the borrow pit (109) and that it was necessary to let up on the application of the brakes so that the bus would have steering way.

(7) The fact that the bus collided almost head-on with a car travelling in the opposite direction at a "fast rate" (according to the testimony of the defendant's driver, 270), took the full momentum of this impact, and then carried this car, grinding it beneath it, for a distance of 144 feet (146), is ample evidence of speed.

(8) The fact that the plaintiff, Rume, was thrown 179 feet through the front of the bus from the point of impact is undeniable evidence of speed (135). Had the driver brought his bus to a stop at the point of impact, Rume would not have been thrown through the windshield and would not have thus received serious injuries.

(9) Captain C. J. Salas of the New Mexico State Police testified that Bach, the driver of the bus, stated immediately after the accident that he, Bach, was driving at the "usual speed" when he first saw the other car angling toward him (139). The usual speed under the facts must necessarily have been in excess of 50 miles per hour.

The defendant, in its brief, seeks to rely upon statements of the Arizona Supreme Court that violation of a speed statute is not in itself negligence per se. It is the plaintiff's contention that whether a breach of the New Mexico speed statute was negligence per se or not, is determined by the law of New Mexico. This seems to be made crystal clear by the authority cited by the defendant in its opening brief, to-wit: Section 380 of the Restatement of the Law of Conflicts. This section, under Sub-section (2) thereof, states as follows:

“Where by the law of the place of wrong, the liability-creating character of the actor’s conduct depends upon the application of a standard of care, and such standard has been defined in particular situations by statute or judicial decision of the law of the place of the actor’s conduct, such application of the standard will be made by the forum.”

Under Comment b of this section the question of negligence per se and breach of statutory duty is discussed:

b. *Negligence per se and breach of statutory duty.*

“If, by the law of the place of the actor’s conduct, the general standard of due care has been defined by judicial decision so as to pronounce certain conduct, as specific acts or omissions, to be or not to be negligent, the forum will apply the standard in the same manner although under the local law the case would have been for the judgment of the jury on the facts in question. So too, if by the statute or other legislative enactment of the state of the actor’s conduct the general standard of due care has been narrowed in a particular situation, the forum will make a similar application of the standard of care although under the local law the case would have been one for the jury because no such statute there existed.”

There is no doubt but that the Restatement is talking about exactly the situation we have here, where the State of New Mexico has defined certain conduct to be negligent, to-wit: the breach of a speed statute. There

seems to be no question but what the violation of a safety statute or ordinance is negligence per se in New Mexico. (*Clay vs. Texas-Arizona Motor Freight, Inc.*, 159 Pac. (2d) 317; *Bell vs. Carter Tobacco Co.*, 41 NM 513; 71 Pac. (2d) 683; *Pettes vs. Jones*, 66 Pac. (2d) 967).

In the *Pettes vs. Jones* case supra at page 972 thereof, we find the following:

“Let it be remembered that we have heretofore been referring to the method of ascertaining the existence of negligence and proximate cause *when no fixed standard of conduct has been prescribed.*”

“The violation of a statutory standard of conduct is negligence per se . . . ; but when any specific act or dereliction is so universally wrongful as to attract the attention of the law-making power, and this concrete wrong is expressly prohibited by law or ordinance a violation of this law, a commission of the specific act forbidden is for civil purposes correctly called negligence per se.”

A United States Court hearing a case where jurisdiction depends on diversity of citizenship will apply the rule of conflicts of laws of the jurisdiction within which it sits. (54 Am. Jur. 981). The law of Arizona is that the liability of a defendant in an automobile personal injury case should be determined by the law of the state where the accident occurred.

“The accident occurred in the State of California, and, while an action of this nature is transitory, and since Maricopa County was the residence

of the appellee, the superior court of such county had jurisdiction thereof, the liability of appellee should be determined, not by the law of Arizona, but by that of California. This is true as to the right of recovery for negligence.” (Friedman vs. Friedman, 9 Pac. (2d) 1015, 1017).

The Arizona Supreme Court has also said that in all matters of common law not previously determined by decision in the State of Arizona, that the Restatement of Laws will be followed.

Reed vs. Real Detective Publishing Co., 63 Ariz. 294, 162 Pac. (2d) 133;

Smith vs. Normart, 51 Ariz. 134, 75 Pac. (2d) 38, 114 A. L. R. 1456.

The *Friedman* case, *supra*, and Subsection 2 of Section 380 of the Restatement of the Conflict of Laws, definitely establish that the law of Arizona is that a breach of a New Mexico speed statute, in New Mexico, is to be considered negligence per se in an Arizona court.

The case of *McIver vs. Allen* (33 Ariz. 28; 262 Pac. 5) and *Alabam Freight Lines vs. Phoenix Bakery, Inc.* (64 Ariz. 101; 166 Pac. (2d) 816) are of very little comfort to the defendant. Both of these cases clearly indicate that if the breach of a speed statute proximately causes an injury, there is negligence to which liability attaches. This question of proximate cause will be taken up in the following section of the argument.

II. The Efficient and Proximate Cause of Plaintiffs' Injuries Was the Negligent Act of a Third Person and Not An Act of the Defendant.

Under this portion of his argument, the defendant contends that the proximate cause of the plaintiffs' injuries was the negligent act of a third person and not an act of the defendant. This, of course, states the defendant's view throughout the case and one which was argued at length to the jury. It is one theory of the case. The plaintiffs' theory of the case was that there were two concurring causes of the accident, one of which was the act of a third person (which, under the facts before the court, cannot be adjudged to be negligent), and the other the negligent conduct of the defendant. The jury, under proper instructions from the court (the defendant had no quarrel with any of the instructions given the jury) held for the plaintiffs. It is now, then, merely a question of whether there was any reasonable evidence from which the jury could find on this question of proximate cause for the plaintiffs.

The case of *Alexander vs. Pacific Greyhound Lines, Inc.*, 65 Ariz. 187; 177 Pac. (2d) 229, is the case which the defendant claims to be undistinguishable from the present case. It is true that there are certain similarities between that case and this. The defendant is the same. The defense attorney is the same. The collision occurs when a car, driving in the opposite direction from the bus, turns over on the wrong side of the road and hits a bus. There the similarity ceases.

In the *Alexander* case the testimony was *undisputed* that the defendant's bus driver had no warning

that the other car was going to swerve into him until it reached within 20 or 30 feet of the bus. In the court's reasoning we find the following statement:

“In the *Dennis vs. Maher* case, Supra, the driver of the vehicle that collided with the bus was on the wrong side of the road as the facts show, but in the instant case the driver of the Essex car was in his proper path and *there was no advance indication that his car was going to leave his side of the road and collide with the bus.*” (Emphasis supplied.)

The *Dennis vs. Maher* case referred to is reported in 84 Pac. (2d) 1029 and is a Washington case, which the Arizona Supreme Court does not disparage, but distinguishes on the facts. In the *Dennis vs. Maher* case a passenger car turned onto its wrong side of the road into the path of the bus. The jury found for the plaintiff. The court held that there was sufficient evidence of speed and sufficient evidence of proximate cause to go to a jury.

The crucial difference between this case and the *Alexander* case is that in the case at bar there is evidence that the bus driver had warning of an impending danger, in sufficient time to avoid the accident, *if* he had been travelling at a lawful rate and *if* he had applied his brakes properly. Evidence of such warning is in part as follows:

(1) The investigating officer, Captain C. J. Salas, testified (139) that the bus driver stated immediately after the accident that the bus driver first noticed the

other car "about 300 feet away", on the bus driver's side of the pavement, "angling" toward the bus.

(2) The testimony of William M. Boone, the defendant's own witness, is destructive of the defendant's theory of the case. This witness does not testify to any sudden turning on the part of the other car. All of his testimony is that the other car came across the pavement in a "gradual arc" (245), or a "long arc" (253).

(3) The witness, Viola B. Tuck, a passenger on the bus, testified that she first became aware of an impending accident by the sudden application of brakes. She was thrown forward to the seat in front of her, knocking her teeth out. After this application of brakes, she raised her head and saw the other car approaching the bus at a distance, which she estimated to be the same as the length of the courtroom. (103, 104, 116). This was later established to be a distance of 65 feet (166). Mrs. Tuck estimated the time between the time she was thrown forward by the violent application of brakes and the time she looked up to see the other car approaching to be "half a minute" (111). This estimate may be high, but it is very reasonable to assume that it took her a matter of several seconds to straighten up against the force of what we must assume to be a rapidly decelerating bus and focus her eyes on the road ahead. 260 feet (121, 166) up the road from the point of impact were dual wheel skid marks on the pavement, angling toward the borrow pit. (109). *These were the only skid marks of this nature in the vicinity*

of the accident, except those right at the point of impact. Certainly the violent application of brakes which broke Mrs. Tuck's teeth left skid marks on the pavement, and by a process of elimination, these skid marks must be the ones 260 feet from the point of impact.

(4) The plaintiff, George Rumeh, testified that prior to the accident he was "lying down", trying to rest, that he was awakened by brakes being "slammed on", that the brakes were held down for "a little while", that he sat up, and that he saw the other car almost upon them (196). It is certainly reasonable to infer that it took Rumeh several seconds to raise up from a partially prone position, and see the car ahead. This testimony again indicates that there must have been skid marks many feet prior to the point of impact, and the skid marks 260 feet from the point of impact must be the ones, as they were the only skid marks near the accident except those at the point of impact.

Any item of the testimony outlined immediately preceding would be reasonable grounds to conclude that the bus driver had warning of the erratic behavior of the other car in such time that if he had been travelling at a lawful speed, and if he had applied his brakes properly the accident would not have happened. The fact that three passengers in the bus (Tuck, Rumeh and Boone) all observed the impending disaster in some detail would seem to be conclusive evidence that the "sudden turning" theory of the de-

fendant's is not true. Passengers do not ordinarily keep their eyes glued on the road, and something must have happened to have attracted their attention long prior to the time the other car is supposed to have approached within the "40, 50 feet" testified to by the driver, Cody Bach, (270), and without any warning "cut it at a three-quarters angle", "sharp as you cut a car" into the bus. This testimony of the bus driver conflicts with the testimony of every other witness to the accident, including the defendant's other witness, William M. Boone, and does not jibe with the physical facts in evidence.

The applicable law pertaining to proximate cause is that the determination thereof is ordinarily a question for the jury. The Supreme Court of Arizona has reiterated this doctrine many times, a very recent case applying this law, handed down in January, 1949, being the case of *Nichols vs. City of Phoenix*, 202 Pac. (2d) 201. This is a case where a third party ran a boulevard stop sign at a speed estimated by various witnesses as between 50 to 65 miles per hour, and crashed into the right rear of defendant's bus, which was travelling on a "through street". The plaintiff was a passenger in the bus, and sued defendant for injuries sustained. The defense was, there as here, that the negligent act of the third party was the sole proximate cause of the accident. A directed verdict was given the defendant in the lower court. The case was reversed and remanded for a new trial, the court holding the question of proximate cause to be for the jury. The court said in part: (middle page 209) :

“If an injury is caused by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and neither can operate as an efficient intervening cause with regard to the other, nor can either party escape liability, so long as his own negligent act is one of the proximate causes of the injury.”

The court, in the *Nichols* case, dismisses the defendant's argument that it should not be held to anticipate an illegal act (running of the boulevard stop sign) of a third party. The court held that it was a jury question as to whether the intervening illegal act of the other car relieved the bus driver of liability. The court quoted from a previous Arizona case, *Apache Railroad Co. vs. Shumway*, 62 Ariz. 359; 158 Pac. (2d) 142, 150; 159 ALR 857, as follows:

“ . . . It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable (citing cases). That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored.”

The Arizona court in this *Nichols* case is applying the general law of joint-tort liability, which is stated in 38 Am. Jur. 717, as follows:

“The rule is that when an injury occurs through the concurrent negligence of two persons, and it would not have happened in the absence of the negligence of either person, the negligence of each of the wrongdoers will be deemed a proximate cause of the injury, although they may have acted independently of one another; and both are answerable, jointly or severally, to the same extent as though the injury were caused by his negligence alone, without reference to which one was guilty of the last act of negligence.”

It should be remembered that proximate cause can be proven by circumstantial evidence. This law is stated in the case of *Inspiration Consolidated Copper Co. vs. Conwell*, 190 Pac. 88, 90; 21 Ariz. 480:

“Proximate cause is a question of fact and a question for the jury if there is substantial evidence from which it may reasonably be deduced that the negligence shown was the proximate cause of the injury complained of. In short, proximate cause may be determined from circumstantial evidence.”

This law applied by the Arizona court is generally also the law of New Mexico. In New Mexico also the question of proximate cause is usually for the jury.

“It (proximate cause) is an ultimate fact, and is usually an inference to be drawn by the jury from the facts proved. It only becomes a question of law when the facts regarding causation are undisputed and all reasonable inferences that can be drawn therefrom are plain, consistent, and uncontradictory.” (*Greenfield vs. Bruskas*, 68 Pac. (2d) 921, 926).

As a matter of fact, the law of New Mexico is apparently even more favorable to the plaintiffs' side of the case than Arizona law. In New Mexico, the breach of a speed statute carries with it the presumption that such breach is the proximate cause of any injury associated with such violation. This law is stated in the case of *Bass Drilling Co. vs. Ray*, 101 Fed. (2d) 316, 321, (10th CCA case arising in New Mexico) as follows:

“ . . . , if the intestate was operating the truck at a speed greater than 45 miles per hour and the jury had so found under proper instructions, that constituting negligence per se on his part, the burden then would have been shifted to plaintiff to show that such speed was not a contributing cause to the injury in order to recover.”

In view of the fact that the law of conflicts is that the law of the place of the injury controls problems of causation, this law of New Mexico would seem to have immediate bearing.

“Whether an act is the legal cause of another's injury is determined by the law of the place of the wrong.” (Sec. 383 Restatement of the Law of Conflicts).

In discussing the evidence of the case, the plaintiff has, for the purposes of argument, divided the evidence into that tending to bear most directly on negligence, and that tending to bear most directly on proximate cause. But, it must be remembered that the problems of negligence and proximate cause are inter-

woven to great extent, and that evidence which tends to establish one, also quite often tends to establish the other. For instance, if the bus was travelling at a speed considerably in excess of the lawful limit, this alone necessarily had effect towards causing or increasing the severity of the plaintiffs' injuries. Also, the evidence which tends to show prior warning of the impending accident tends to show negligence on the part of the driver in not avoiding it.

Summarizing, it borders upon the facetious to argue that the defendant's bus was not exceeding the speed limit immediately prior to the accident. Even the scheduled "*average*" speed of the bus over this portion of its route was in excess of the lawful speed limit. And the evidence is uncontradicted that the bus picked up eight minutes on its schedule in the fifty miles immediately preceding the accident. This would indicate an *average* speed of the bus as being just short of 58 miles per hour over this distance. The bus driver himself was honest enough not to claim that he was not exceeding the speed limit immediately prior to the accident. The bus driver admitted to the officer investigating the accident that he was going at the "usual speed" just prior to the accident. This "usual speed" must be around seventy miles per hour to permit an average speed of 58 miles per hour. The physical facts themselves speak most eloquently of speed. The friction created by the crushing and pushing along of the Ford automobile for 144 feet must be terrific, and more than equal to the full application of all available

brakes. On top of this, the full impact of the other car approaching at a fast rate was completely absorbed by the bus' forward impetus. The degree which the bus was slowed down by the impact is indicated by the fact that human bodies were thrown forward from the bus as far as 179 feet from the point of impact. One cannot look at the pictures of the bus (which are in evidence) taken after the accident, without realizing that the bus was going at a terrific rate of speed. These physical facts speak for themselves. In the case of *West vs. Jaloff*, 232 Pac. 642, 645; 36 ALR 139, the Supreme Court of Oregon had this to say about evidence of speed:

“In fact, this might also be said to be a case where the doctrine of *res ipsa loquitur* in itself would indicate that the machine was being driven at an enormous rate of speed, or at least greatly in excess of 20 miles an hour. It was a machine weighing about 4000 pounds. It collided with a truck, and was shunted off its course, ran nearly across the street, climbed an elevation of about 1 foot, struck the plaintiff, and pushed him through a door which he was endeavoring to open, and continued its course, with the man in front of it, until two thirds of the machine had passed through the front of the building and was inside of the cigar store. This, of itself, was evidence to go to the jury of the fact that the machine was being driven at an exceedingly high rate of speed. There was also other evidence, although contradicted, that such was actually the case.”

And if the bus was travelling at a rate in excess of the lawful speed limit, can an appellate court say as a matter of law that this speed did not contribute to plaintiff's injuries? Under *any* circumstances, this unlawful speed must have had some effect towards increasing the severity of the injuries. But, under the facts in this case, it would seem to affirmatively appear that this particular accident could not have happened if it had not been either for this excessive speed, or the failure on the part of the driver to apply brakes. *All* of the testimony in the case, with the lone exception of the testimony of the driver of the bus, whose testimony must humanly be colored to some extent, would lead one to believe that the Ford car started across the road in a long arc when the bus and car were between 180 and 500 yards apart. The skid marks on the pavement, approximately 260 feet from the point of impact, would be better evidence of distance than any hastily made estimate made by the startled passengers in the bus. These marks are circumstantial evidence that the cars were somewhat more than 500 feet apart when the first application of brakes was made, when Mrs. Tuck's teeth were knocked out, when George Rumeh was aroused from his slumber, and when Mr. Boone's attention was diverted from the conversation he was having with the woman across the aisle (255). All of these witnesses were given sufficient warning of some impending hazard in the road, in time for them to have seen the last portion of the tragedy in full effect. And if the bus driver had been driving at a lawful speed, the warning that was given

would have permitted the bus to come to a complete stop long before the point of impact had been reached, and *there would have been no point of impact*, for the "long arc" of the Ford car would have carried it off the road without damage to the bus or its passengers.

In conclusion, the determination of proximate cause does not call for strained or scientific reasoning. It calls for a common sense determination by a jury of reasonable men under proper instructions from the court. This determination has been had and a jury of twelve substantial citizens has determined that some negligent act on the part of the defendant contributed to the injuries of the plaintiffs. The facts of this case would seem to impel any reasonable man to reach this same conclusion, but, even if this were not the case, even if such conclusion were against the weight of the evidence, that determination is entitled to being sustained unless there is *no* reasonable evidence to support it. The plaintiffs submit that there is certainly no such vacuum of evidence requiring a reversal of this case.

III. The Accident Was Unavoidable as Defendant Was Confronted With a Sudden Emergency and Exercised Its Best Judgment Under the Circumstances.

From the small space given by the defendant to the argument to the effect that the accident was unavoidable because of a sudden emergency, it would seem that defendant's Counsel do not seriously believe the proposition to be a valid one for the consideration of this Court.

Plaintiffs believe that this argument is sufficiently and properly answered by the following:

“Nevertheless, in an emergency, the driver must still continue to exercise that degree of skill, diligence and foresight owed by a carrier to its passengers, and a failure in this regard, even at such a time, is negligence; and, moreover, he must drive in such a manner that he can anticipate and look out (for) and protect his passengers if some emergency arises, and cannot excuse his conduct on the ground of sudden emergency if his own conduct is a contributing cause thereof.”

Blashfield's Encyclo. of Auto Law, Vol. 4, Part 1, Sec. 2163, p. 114.

The following instruction given on the trial of a case and approved by the Supreme Court of the State of Arizona on appeal, we feel, correctly states the law with respect to sudden emergencies:

“I instruct you that the rule that a defendant who is confronted with a sudden emergency is not held to the same calm and correct conduct as if he had not been confronted with any such emergency *applies only in cases where the sudden emergency was not due to the defendant's own negligence.*” (Emphasis supplied).

Western Truck Lines vs. Barry, 78 Pac. (2d) 997, 52 Ariz. 48.

The following statement from *Corpus Juris* further states the law on this proposition:

“A mere necessity for quick action does not constitute an emergency . . . where the situation or the danger calling for such action is one which should reasonably have been anticipated and which the person charged with negligence should have been prepared to meet. . . .”

45 C. J., Section 92, p. 712.

In any event, the question is properly one for the determination of the jury:

“Failure to exercise the most exact judgment in a sudden emergency does not charge one with contributory negligence as a matter of law. The question is one of fact for the jury.”

45 C. J., *Negligence*, Sec. 865, p. 1310.

The proposition is universally conceded and needs no citation of authority that an appellate court will not review the weight of the evidence or determine what verdict should have been rendered thereon; its province being merely to determine whether or not there was sufficient evidence to warrant the verdict.

The testimony of the defendant's own witness, William B. Boone (253), that the Ford automobile came from its own side of the road to the side of the road on which the bus was travelling “on a long arc” is certainly evidence from which a jury could properly find either that there was no sudden emergency created or that if an emergency was created it resulted from the negligent acts and conduct of the defendant's driver, Cody Bach.

IV. The Amounts Awarded Plaintiffs Were Excessive and the Verdicts Were Rendered Under Influence of Passion or Prejudice.

Replying to the contention of Counsel for Defendant that the jury rendered verdicts in favor of the plaintiffs which were excessive and rendered under the influence of passion or prejudice, plaintiffs feel that it will suffice to call this Court's attention to the undisputed testimony as to the injuries suffered by the plaintiffs.

The undisputed testimony adduced upon the trial of this case was that the plaintiff, George Rumeh, suffered a scalp wound (83), a broken nose (83 and 198), fracture of the right humerus at the shoulder joint (83), a fractured rib on both right and left sides (84) and a *reactivation of the tuberculosis* which had been in an arrested stage before the accident. (84). The testimony of Dr. Long on this point is as follows (84):

Q BY MR. CARLTON: What was the result of your examination?

A Well, I found that the old tuberculosis lesion *had been reactivated by the injuries*, and that the fluid in the pleural cavity had increased and the right lung had shrunk and become more incapacitated. (Emphasis supplied.)

And again, Dr. Long testified and replied to a further question (86):

Q BY MR. CARLTON: What did you find on this last examination as regards his tubercular condition?

A Well, his lung was contracted and the tissue that was air-containing tissue when I first saw him has now contracted and there is no air going into it. *His right lung is not functioning at all.* (Emphasis supplied.)

With respect to the fracture of the humerus, Dr. Long testified as follows (91):

Q BY MR. CARLTON: From your examination of him this last week, state whether or not it is your opinion that that condition has improved or has gotten worse or is the same.

A He can move this function of the shoulder joint very slightly, but when he moves this arm the shoulder blade has to go with it. It has to work up and down like a hinge, and a fixation in here, where this femur, humerus, doesn't rotate in the shoulder joint. He has to work the shoulder blade to work the arm to any great extent.

Dr. Long further testified (92) that the injuries from which the plaintiff, George Rumeh, was suffering at the time of the trial of this case were permanent and total.

Defendant's counsel seems to urge upon this Court that any finding that the accident aggravated Mr. Rumeh's prior arrested case of tuberculosis was conjectural and merely a matter of opinion. This leads plaintiffs to cite to this Court the following quotation from an opinion of the Supreme Court of the State of Arizona:

“The jury might have found therefrom [the evidence] that Mrs. Enloe had fully recovered from a case of tuberculosis and that by reason of the accident there had been a recurrence of the disease to such an extent that at the time of trial she was totally disabled from work and that her ultimate recovery was problematical and at best would require a long period of absolute rest and professional nursing.”

Cox vs. Enloe, 70 Pac. (2d) 331, 50 Ariz. 201.

It is difficult to conceive of an injury which could be more serious and more completely disabling than the loss of the use of a lung, and it must be remembered that the undisputed testimony further indicated that the plaintiff, George Rume, had lost as a direct and proximate result of the injuries sustained by him in the accident 90 per cent of the motion of his right arm at the shoulder joint.

Defendant's counsel seems to feel that there was no loss of earnings shown on behalf of the plaintiff, Mr. Rume. Replying to this, we merely refer this Court to the uncontroverted testimony of Mr. Rume (214) to the effect that he had been unable to work from the time of the accident until the time of the trial. He further testified that prior to the accident he had been earning \$250.00 to \$300.00 per month by operating a grocery store in Claypool, Arizona, and the loss of earnings thus indicated, up to the time of the trial, had continued for a period of 31 months and was equal to a sum of from \$7750.00 to \$9300.00.

The verdict awarded Mrs. Rhodes was not in any sense excessive. The evidence conclusively shows that she suffered a broken back, was greatly shocked and bruised, and lost two front teeth as a result of the accident. She has suffered severe pain and discomfort since the time of the accident and under the evidence her physical condition has become progressively worse. She has expended approximately \$690.00 for medical care and unquestionably will spend substantial sums for continued medical treatment in the future. Because of her injuries she will be unable to attend to her household duties or perform any work of any consequence.

The X-ray pictures disclose a misplaced vertebra or a condition of spondylolisthesis. Dr. Secrist testified (179) that, "This is severe spondylolisthesis, the slipping of one vertebra on one below." Both Dr. Thomas (175) and Dr. Secrist (179) testified that her back condition was sufficient to cause the soreness and pain of which she complains.

Prior to the time of the accident, Mrs. Rhodes was a housewife and mother and of the age of 45 years, with a life expectancy of 26.72 years. The sum of \$11,000.00 is certainly not excessive in her case. The X-ray pictures are mute evidence of the seriousness of her condition and prove beyond question that she suffered serious and permanent injuries as a result of the accident. Both plaintiffs have been seriously and permanently injured as a result of the negligence of the defendant.

We respectfully submit that the court should not disturb the province of the jury in its duty of assessing damages, unless the damages are so excessive as to appear to the court as being unreasonable and outrageous and such as manifestly shows the jury to have been activated by passion and prejudice.

Counsel for plaintiffs see nothing in the size of the verdicts which bears the earmarks of a quotient verdict as suggested by defendant's counsel. Neither does the size of the verdicts indicate that the jury was acting under the influence of passion and prejudice.

Corpus Juris Secundum has stated the general rule on the measure of damages as follows:

“A finding of value or the amount of damages is so much a matter within the exclusive province of the jury that it will ordinarily not be disturbed by the reviewing Court where the issue had been fairly submitted under proper instructions, unless palpably without support in the evidence presented at the trial unless the jury have departed from the legal measure of damages, or unless the verdict is so palpably excessive or grossly inadequate as to indicate bias, passion, prejudice, corruption, outside influence, or mistake, or shock the conscience or sense of justice, or unless manifest error therein otherwise appears. The rule is particularly applicable where the recovery is based on conflicting evidence, where the amount of the verdict is justified or supported by the evidence, or has been approved by the trial court.”

5 C. J. Secundum, Section 1650, pp. 640-645.

Our Supreme Court in the case of *Standard Oil Company of California vs. Shields*, 58 Ariz. 239, 119 Pac. (2d) 116, 119, sets forth the items of damage which may be recovered in a damage action such as this, as follows:

“The damages permissible in a case of this nature may be divided legally into three classes, (a) out of pocket expenses for past and prospective medical and other items rendered necessary by the accident, and damages to plaintiff’s automobile. These may be calculated with reasonable certainty; (b) loss of earning power by reason of injury, which may be calculated on an evidentiary basis, although not always with the same certainty as the first class; and (c) pain and suffering, past and prospective. This last, of course, is an item for which no definite rule of estimation may be given and, therefore, a great amount of discretion may, and properly should, be left to the jury.”

The Arizona case of *United Verde Copper Co. v. Wiley*, 20 Arizona, 525, 183 Pac. 737, 738, expressed itself on the amount of damages to be awarded for pain and suffering in the following language:

“... we think the rule laid down by Chancellor KENT in *Coleman vs. Southwick*, 9 Johns (N. Y.) 45, 6 Am. Dec. 253, is controlling. He said:

“ ‘The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice or cor-

ruption. In short, the damages must be flagrantly outrageous and extravagant or the court cannot undertake to draw the line, for they have no standard by which to ascertain the excess'." (Emphasis added.)

The court in the *United Verde* case after setting forth this rule, then quoted with approval the following comment upon the rule from the case of *Chicago, R. I. and P. Ry. Co. v. De Vore*, 43 Okla. 534, 143 Pac. 864 L. R. A. 1915F 21:

"We think this rule is sound, for the reason the jury and the trial judge have a much better opportunity than do the appellate judges to measure the actual damages suffered by the plaintiff and the amount which would compensate him for the injury. They have an opportunity of seeing the plaintiff and to discern his manner of testifying, his intelligence and his capacity, to note his physical condition, and many other living evidences bearing upon the issue, including all the attending circumstances, of the larger part of which the appellate court is deprived. The jury, thus being in possession of all the facts and circumstances, is required to pass upon this issue as an issue of fact, under an appropriate charge of the court as to law. Their solemn finding, returned into court and approved by the trial court, should not be disturbed by this court, unless it comes within the rule hereinbefore laid down. The trial judge has not only the opportunity afforded the jurors to gain knowledge of the conditions of the plaintiff's injury, and the amount which will compensate him,

together with all the facts and circumstances surrounding his injury, but he also has the opportunity of observing the jurors in considering said cause, and of any outward feeling evidencing passion or prejudice that may be exhibited during the proceedings before him; and if it is made reasonably to appear that the verdict of the jury is excessive, by reason of any influence of passion or prejudice, it becomes his sworn and solemn duty, as a trial court, to set aside the verdict or require a remittitur to be filed. After he has considered this point on a motion for new trial, and approved the verdict by overruling the motion, the appellate court should never disturb the finding and judgment of the trial court, except for the gravest reasons, wherein it clearly appears that the trial court has abused its discretion, or that the verdict is excessive within the rule herein stated. Quotations from many courts show this rule to be sound and in harmony with the weight of authority, and based upon reason and justice."

It seems futile to cite to this court any of the multitude of cases in which verdicts considerably greater than the awards made in this case have been sustained by reviewing courts as not excessive. Comparison with prior judgments supplies no valuable basis for determination of the question because each case must stand on its own facts and no two cases are alike. There is, however, nothing in the evidence in this case indicating that these verdicts are excessive.

In determining the amount of an award a jury may take into consideration the value of money at the time of the trial and the general state of inflation or deflation as the case may be. This proposition is clearly set forth in *15 American Jurisprudence, Damages Section*, Page 621, as follows:

“In personal injury actions the courts have for a long time, in passing upon objections of excessiveness or inadequacy of the damages allowed and in comparing present and past verdicts for similar injuries, given consideration to the increased cost of living and the impaired purchasing power of money. They have, when the matter was pressed upon their attention, and frequently upon their own initiative, quite uniformly recognized the validity of this consideration both as regards the ultimate question of excessiveness or inadequacy of the damages allowed by juries in current actions for personal injuries and as affecting the use of, and basis of comparison with, rulings as to damages in earlier cases. As has been said, compensation means compensation in value. It will not do to say that the same amount of money affords the same compensation when money is cheap as when money is dear. The value of money lies not in what it is, but in what it will buy. A sum of money that was fair compensation in value for given injuries when money was dear and its purchasing power was great will not suffice when money is cheap and its purchasing power is small. Increased cost of living or diminished purchasing power of money has not only been rec-

ognized as a proper matter for consideration by the court in passing upon a verdict attacked as excessive or inadequate, but has also been held to be a proper matter for the consideration of the jury in reaching a verdict in the first instance.”

We feel that this court will take judicial notice of the fact that money and its purchasing power is today only about $\frac{1}{2}$ of what it was ten years ago.

In determining whether or not a verdict is excessive it must be borne in mind that the jury cannot be expected to determine the amount of the award with the precision of mathematical computation. Every case must stand or fall upon the facts of that particular case and it is universally conceded that Appellate Courts are very reluctant to review the findings or to review the propriety of an award by a jury who has had the opportunity to listen to the testimony, to see the condition and appearance of the parties and to examine and analyze the demeanor and composure of the parties and their witnesses while on the stand. The trial court heard the evidence, saw the witnesses, and listened to counsel's arguments on these same matters and has denied all of defendant's contentions set forth in its appeal.

In conclusion it is submitted that there was introduced in evidence at the trial of this action evidentiary facts from which the jury could reasonably conclude that some negligent act of the defendant was a contributing cause of the plaintiff's injuries. The transcript of record is replete with such evidence. The

amounts of the verdicts returned, in light of the severe injuries sustained by both of the plaintiffs are certainly not so disproportionate as to call for modification by an appellate court. The verdicts rendered by the jury and the judgment rendered by the trial court should be sustained in toto.

Respectfully submitted,

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